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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 19[redacted] 1957

No. [redacted]98

UNITED STATES OF AMERICA, PETITIONER

vs.

WILLIAM V. MASSEI

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 5, 1957
CERTIORARI GRANTED MAY 20, 1957

INDEX.

		Page
Docket entries		1
Indictment		4
Arraignment and Plea		9
Motion to Dismiss the Indictment		9
Motion to Inspect Grand Jury Minutes		12
Motion for Bill of Particulars		12
Bill of Particulars		13
Motion to Dismiss for Inadequacy of Bill of Particulars		15
Motion to Dismiss for Failure to Grant Appellant a Speedy Trial		16
Motion for Hearing on Motion to Dismiss filed February 25, 1953		18
Motion to Suppress		20
Hearing, May 16, 1955		20
Hearing, June 6, 1955		24
Hearing, June 27, 1955		28
Hearing, October 5, 1955		31
Hearing, November 1, 1955		31
Hearing, January 9, 1956		35
Hearing, February 27, 1956		36
Stenographic Record of Trial:		38
Testmony of:		
Carlton L. Baine,	Direct	97
	Cross	119
Lawrence H. Cross,	Direct	119
James R. Stone, Jr.,	Direct	124
Dean E. Storey,	Direct	128
	Cross	131
Frank A. Brown,	Direct	131
	Cross	135
	Redirect	135
Grant L. Chaffin,	Direct	136

Testimony of:		Page
David Robertson,	Direct	140
John J. McKiernan,	Direct	143
	Cross	150
Elwin A. Guthrie,	Direct	151
	Cross	171
	Redirect	174
David Robertson (resumed),	Direct	177
	Cross	180
	Redirect	180
	Re-cross	180
	Further Redirect	180
	Further Re-cross	181
Albert L. Saunders,	Direct	182
Victor J. Barbone,	Direct	186
Albert F. Wadden,	Direct	187
Bernard G. Sutherland,	Direct	189
	Cross	194
Jeremiah T. O'Leary,	Direct	198
	Cross	208
	Redirect	210
Herbert E. Jacobson,	Direct	221
F. Joseph Donohue,	Direct	230
Joseph Urso,	Direct	232
	Cross	235
	Redirect	235
Samuel Urso,	Direct	236
Edward Comerford, Jr.,	Direct	239
	Cross	241
	Redirect	242
Dominic Pingitore,	Direct	242
John S. Sherman,	Direct	244
Ernest Renaud,	Direct	248
	Cross	250

Testimony of:		Page
Edward Massei,	Direct	251
	Cross	254
Marguerite Whitford,	Direct	255
Leland C. Richardson,	Direct	258
	Cross	271
John L. Bianchi,	Direct	277
	Cross	279
Domenic A. Ierardi,	Direct	281
Harold Hurst,	Direct	322
	Cross	344
Charles J. Isber,	Direct	372
	Cross	390
Dominic A. Ierardi (resumed),	Direct	408
	Cross	415
Harold Hurst,	Direct	417
	Cross	517
	Redirect	564
	Re-cross	570
John P. Ryan,	Direct	572
Charles J. Asher,	Direct	573
	Cross	582
	Redirect	590
	Re-cross	591
	Redirect	594
	Re-cross	594
Louis J. Calatrello,	Direct	597
	Cross	600
Opening Statement to the Jury by Richard Maguire, Esq.		609
Testimony of:		
W. Arthur Garrity, Jr.,	Direct	621
	Cross	641
	Redirect	673
	Re-cross	673

	Page
Charge to the Jury	717
Memorandum on admissibility of alleged admissions by the defendant's attorney, offered as an exhibit for identification at page 624, line 1, and at page 968, line 20	760
Government's Exhibit 44 for identification, entitled "Annual Statement of Net Worth"	775
Government's Exhibit 45 for identification, entitled "Tax Computation"	777
Motion for Verdict of Acquittal	779
Appellant's Request for Instructions	779
Judgment and Commitment	787
Notice of Appeal	788
Proceeding in Court of Appeals:	
Stipulation as to exhibits	789
Statement of Points	790
Designation of Contents of Record Appendix	793
Proceedings in U. S. C. A. for the First Circuit	795
Minute entry of argument and submission (omitted in printing)	795
Opinion, Hartigan	795
Dissenting opinion, Woodbury, J	809
Judgment	811
Clerk's certificate (omitted in printing)	811
Order extending time to file petition for writ of certiorari	811
Order allowing certiorari	812

432278—57

DISTRICT OF MASSACHUSETTS.

I, JOHN A. CANAVAN, Clerk of the United States District Court, District of Massachusetts, do hereby certify that the following entries are on the CRIMINAL DOCKET, in the cause entitled:

Criminal No. 53-38-M.

The United States

v.

William V. Massei.

Violation of Title 26 USC Sec. 145(b)
Evasion of Income Taxes (5 counts).

1953

Feb. 16 Indictment returned.

25 Motion to Dismiss Indictment filed by defendant.

25 Motion to Inspect Grand Jury Minutes filed by Defendant.

25 McCarthy, J. Defendant arraigned and pleaded not guilty. Defendant ordered to recognize in $5000., without security. Recog. on file. Defendant given thirty days within which to file special pleas.

27 McCarthy, J. In the above entitled cause it is hereby ORDERED that all special pleas and motions of any character or nature, and affidavits on motions filed February 25, 1953, are to be filed on March 24, 1953, and it is ORDERED that said motions, special pleas, and affidavits be impounded. Copies mailed to United States Attorney and Richard Maguire, Esq., attorney for defendant.

Mar. 24 Motion for Discovery and Inspection filed by defendant.

24 Motion for a Bill of Particulars filed by defendant.

24 Motion for Production of Documentary Evidence and Objects at a Time Prior to Trial, filed by defendant.

1953

June 16 McCarthy, J. In the above-entitled case, and specifically in regard to the Motion to Dismiss the Indictment filed February 25, 1953, it is hereby ORDERED that an affidavit in support of said motion, setting forth the facts, must be filed within fifteen (15) days, otherwise the motion will be denied. Copies to William J. Koen, Asst. U. S. Attorney, and Richard Maguire, representing the defendant.

Dec. 28 McCarthy, J. Motions to be heard Jan. 10, 1955 at 10 A.M.

1955

Jan. 7 McCarthy, J. In the above-entitled cause, it appearing to the Court that the order entered on June 16, 1953 directing the Defendant to file an affidavit in support of Defendant's motion to dismiss the indictment filed on February 25, 1953, within fifteen days has not been complied with and in accordance with said order, it is hereby ORDERED that said motion be and it hereby is denied. Notice to counsel.

May 16 McCarthy, J. After hearing, Defendant's Motion to Inspect Grand Jury Minutes denied.

June 10 Stenographic Record of hearing May 16, 1955 filed.

6 McCarthy, J. Defendant's Motion for Bill of Particulars allowed only as to likely and probable source of income.

16 Stenographic Record of Hearing on June 5, 1955 filed.

23 Motion to Dismiss filed by defendant.

27 McCarthy, J. Defendant's Motion to Dismiss denied. Government to furnish probable and likely source of income within ten days.

1955

July 13 Motion to Dismiss filed by Defendant.
25 Bill of Particulars filed by plaintiff.
Sept. 6 Motion to Dismiss filed by Defendant.
Nov. 10 Stenographic Report of hearing November 1, 55; filed.

1956

Feb. 28 Stenographic record of January 9, 1956 filed.
Apr. 2 McCarthy, J. Hearing on Deft's motion to dismiss and Deft's motion for hearing on motion to dismiss filed Feb. 25, 1953—motions denied—Deft. set to the bar to be tried—jury empanelled and sworn—Edmund G. Crowley, Foreman.
3 Jury trial continues—
4 Jury trial continues—Deft's motion to suppress filed and impounded—decision reserved—Govt's opening statement—evidence.—
5 Jury trial continues—evidence—
6 Jury trial continues—evidence—
10 Jury trial continues—evidence—
11 Jury trial continues—evidence—
12 Jury trial continues—evidence—
13 Jury trial continues — evidence — Govt. rests — Deft's motion for verdict of acquittal—
16 Jury trial continues—Deft's opening statement—evidence—
17 Jury trial continues — evidence — Deft. rests — Govt. rests—Hearing on Deft's motion for verdict of acquittal—motion denied—Deft's request for instructions — Govt's request for instructions—
18 Jury trial continues—arguments to jury—charge to jury—verdict of jury—guilty on Counts 1, 2, 3, 4, & 5. Jury discharged—continued for disposition—present bail continued.

1956

May 8 McCarthy, J. Deft. sentenced to two years in prison, and to pay a fine in the sum of $5,000.00. Execution of sentence stayed pending appeal.

11 Judgment and Commitment entered.

9 Vol. XI of steno record filed. (hearing of April 17th)

11 Notice of appeal filed by the defendant.
Copies of notice of appeal mailed to William J. Koen, Asst. U.S. Atty. and delivered to the U. S. Court of Appeals with attested docket entries.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the aforesaid Court at Boston, said District this 24th day of May, 1956.

[SEAL] JOHN A. CANAVAN, *Clerk*

By (s) PENELOPE SULLIVAN, *Deputy Clerk*

INDICTMENT.

DISTRICT COURT OF THE UNITED STATES OF AMERICA
DISTRICT OF MASSACHUSETTS.

At a District Court of the United States of America, for the District of Massachusetts, begun and holden at Boston, within and for said District, on the third Monday of September in the year of our Lord one thousand nine hundred and fifty-two

The Grand Jury, for the United States of America, within and for the District of Massachusetts, charges that

Count 1.

On or about the seventeenth day of February, 1947, in the District of Massachusetts, WILLIAM V. MASSEI of Worcester in said District, who during the calendar year 1946 was married, did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him and his wife to the United States of America for the

calendar year 1946 by filing and causing to be filed with the Collector of Internal Revenue for the Internal Revenue Collection District of Massachusetts at Boston in said District a false and fraudulent joint income tax return on behalf of himself and his said wife, wherein it was stated that their total income for said calendar year was the sum of three thousand, two hundred, thirty-two dollars and sixty-two cents ($3,232.62) and that the amount of tax due and owing thereon was the sum of three hundred sixty-one dollars ($361.00), whereas, as he then and there well knew, their joint total income for the said calendar year was the sum of twenty-nine thousand, six hundred fifty-eight dollars and seventy-three cents ($29,658.73) and their joint net income for the said calendar year was the sum of twenty-nine thousand, one hundred fifty-eight dollars and seventy-three cents ($29,158.73), upon which said net income there was owing to the United States of America an income tax in the sum of eleven thousand, four hundred seventy-four dollars and forty-nine cents ($11,474.49); in violation of Section 145(b) Internal Revenue Code; Title 26 United States Code, Section 145(b).

Count 2.

The Grand Jury further charges that

On or about the fifth day of January, 1948, in the District of Massachusetts, WILLIAM V. MASSEI of Worcester in said District, who during the calendar year 1947 was married, did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him and his wife to the United States of America for the calendar year 1947 by filing and causing to be filed with the Collector of Internal Revenue for the Internal Revenue Collection District of Massachusetts at Boston in said District a false and fraudulent joint income tax return on behalf of himself and his said wife, wherein it was stated that their total

income for said calendar year was the sum of three thousand, five hundred thirty-nine dollars and sixty-six cents ($3,539.66) and that the amount of tax due and owing thereon was the sum of four hundred sixteen dollars ($416.00), whereas, as he then and there well knew, their joint total income for the said calendar year was the sum of twelve thousand, eight hundred thirty-six dollars and sixty-eight cents ($12,836.68) and their joint net income for the said calenlar year was the sum of twelve thousand, three hundred thirty-six dollars and sixty-eight cents ($12,336.68), upon which said net income there was owing to the United States of America an income tax in the sum of two thousand, nine hundred ninety dollars and fifty-four cents ($2,990.54); in violation of Section 145(b) Internal Revenue Code; Title 26 United States Code, Section 145(b).

Count 3.

The Grand Jury further charges that

On or about the eleventh day of January, 1949, in the District of Massachusetts, WILLIAM V. MASSEI of Worcester in said District, who during the calendar year 1948 was married, did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him and his wife to the United States of America for the calendar year 1948 by filing and causing to be filed with the Collector of Internal Revenue for the Internal Revenue Collection District of Massachusetts at Boston in said District a false and fraudulent joint income tax return on behalf of himself and his said wife, wherein it was stated that their total income for said calendar year was the sum of four thousand, five hundred forty-nine dollars and twenty-eight cents ($4,549.28) and that the amount of tax due and owing thereon was the sum of five hundred one dollars ($501.00), whereas, as he then and there well knew, their joint total income for the said calendar year was the

sum of seven thousand twenty-five dollars and thirty cents ($7,025.30) and their joint net income for the said calendar year was the sum of six thousand, three hundred twenty-two dollars and seventy-seven cents ($6,322.77), upon which said net income there was owing to the United States of America an income tax in the sum of eight hundred eighty-one dollars and thirty-eight cents ($881.38); in violation of Section 145(b) Internal Revenue Code; Title 26 United States Code, Section 145(b).

Count 4.

The Grand Jury further charges that

On or about the ninth day of January, 1950, in the District of Massachusetts, WILLIAM V. MASSEI of Worcester in said District, who during the calendar year 1949 was married, did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him and his wife to the United States of America for the calendar year 1949, by filing and causing to be filed with the Collector of Internal Revenue for the Internal Revenue Collection District of Massachusetts at Boston in said District, a false and fraululent joint income tax return on behalf of himself and his said wife, wherein it was stated that their net income for said calendar year was the sum of four thousand five hundred four dollars and forty-two cents ($4,504.42) and that the amount of tax due and owing thereon was the sum of five hundred forty-nine dollars and two cents ($549.02) whereas, as he then and there well knew, their joint net income for the said calendar year was the sum of eleven thousand, one hundred thirty-one dollars and seventy-six cents ($11,131.76), upon which said net income there was owing to the United States of America an income tax of one thousand, eight hundred eighty dollars and thirty-eight cents ($1,880.38); in violation of Section

145(b) Internal Revenue Code; Title 26 United States Code, Section 145(b).

Count 5.

The Grand Jury further charges that

On or about the ninth day of January, 1951, in the District of Massachusetts, WILLIAM V. MASSEI of Worcester in said District, who during the calendar year of 1950 was married, did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him and his wife to the United States of America for the calendar year 1950, by filing and causing to be filed with the Collector of Internal Revenue for the Internal Revenue Collection District of Massachusetts at Boston in said District, a false and fraudulent joint income tax return on behalf of himself and his said wife, wherein it was stated that their net income for said calendar year was the sum of six thousand, thirty-one dollars and fifty-seven cents ($6,031.57) and that the amount of tax due and owing thereon was the sum of eight hundred sixty-two dollars and forty-eight cents ($862.48), whereas, as he then and there well knew, their joint net income for the said calendar year was the sum of thirty-seven thousand, six hundred forty-six dollars and sixty-four cents ($37,646.64) upon which said net income there was owing to the United States of America an income tax of eleven thousand, four hundred sixty-seven dollars and forty-two cents ($11,467.42); in violation of Section 145(b) Internal Revenue Code; Title 26 United States Code, Section 145(b).

A TRUE BILL.

(s) STEPHEN J. RYAN
Foreman of the Grand Jury

(s) WILLIAM J. KOEN
Assistant United States Attorney
for the District of Massachusetts

ARRAIGNMENT AND PLEA.

[Docket entry, Feb. 25, 1953: McCarthy, J. Defendant arraigned and pleaded not guilty. Defendant ordered to recognize in $5000., without security. Recog. on file. Defendant given thirty days within which to file special pleas.]

MOTION TO DISMISS THE INDICTMENT.

The defendant moves that the indictment be dismissed and cites therefor the following:

1) On Wednesday, February 11, 1953, Assistant United States Attorney William J. Koen presented the case of United States v. William V. Massei to the Grand Jury for indictment for a violation of 26 USC 145(b).

2) On Thursday, February 12, 1953, at approximately 9:30 a.m., W. Arthur Garrity, Jr., representing the defendant Massei, had a conference with United States Attorney George F. Garrity and Mr. Koen relative to whether the Grand Jury had voted on the Massei indictment. Upon being informed that the Grand Jury had not as yet voted, and that further testimony was to be presented on the following Monday, February 16, 1953, Mr. Garrity objected to the suspension of the Massei proceeding and called to the attention of the United States Attorney and his assistant the serious prejudice that would result in the defendant's case inasmuch as an indictment against one Frank Iaconi was to be presented to the same Grand Jury that same morning beginning at 10:00 a.m. He pointed out to them the unfairness of such procedure and the bias that would inevitably result in the minds of the Grand Jurors against Massei if the Massei case were now interrupted so as to present to the Grand Jury the complete evidence or any part of it in the Iaconi case. It is common knowledge that said Iaconi has been the subject of much adverse publicity over the years in connection with alleged gambling in the City of Worcester. It was pointed out by Mr. Garrity that

Massei is also a Worcester man and was on the Worcester police force at a time when Iaconi was prosecuted for conducting a lottery in Worcester, and that to keep the Massei case open and present the closing testimony in that case immediately after the conclusion of the evidence in the Iaconi case would inevitably prejudice the minds of the Grand Jurors against Massei. Mr. Garrity's plea for fairness in behalf of Massei was to no avail.

3) On Thursday, February 12, 1953, at 10:00 a.m., the case of United States v. Frank Iaconi was presented to the same Grand Jury for indictment for violation of 26 USC 145(b). The testimony continued all through Thursday and into Friday Afternoon, February 13, 1953, at which time the Grand Jury reported a true bill against Iaconi.

4) On Saturday, February 14, 1953, news of the Iaconi indictment with background material was carried on the front pages of the newspapers throughout Massachusetts.

On the same day subpoenas were served on the following witnesses summoning them to testify in the case of United States v. William V. Massei before the Grand Jury at 10:00 a.m., Monday, February 15, 1953:

(a) Edward Massei—brother of the defendant;

(b) Albert Marcello—City Editor of the Worcester Telegram and Gazette;

(c) William P. Finneran—Chief of Police of Worcester;

(d) Anthony Salvidio—the defendant's accountant:

(e) Bernard Lester.

5) On Monday, February 15, 1953, all of the witnesses named in the preceding paragraph testified before the Grand Jury in the Massei case. Each of the witnesses, with one exception, in his examination by Mr. Koen before the Grand Jury, was asked questions concerning Frank Iaconi. These

questions were put to these witnesses by Mr. Koen although he well knew that Frank Iaconi had nothing whatsoever to do with the case which was being presented against Massei. Indeed, in a trial before a petit jury in the Massei case, such questioning concerning Iaconi would be grounds for a mistrial. Yet Mr. Koen deliberately brought the name of Iaconi into the Massei proceeding in the Grand Jury room with full knowledge of the prejudice that would be aroused in the minds of the Jurors against Massei by associating his name with said Iaconi, against whom this same Grand Jury had reported a true bill only the previous Friday.

WHEREFORE, the defendant moves:

1) That he be granted a hearing on this Motion, at which time he will introduce testimony and/or affidavits to support the facts related above;

2) That his supplementary Motion for Inspection of the Grand Jury Minutes be granted;

3) That this indictment be dismissed for the following reasons:

(a) That the only evidence presented to the Grand Jury was incompetent or illegal;

(b) That the evidence was presented to the Grand Jury in violation of the defendant's constitutional rights;

(c) That the indictment was obtained as a result of the prejudice and bias built up in the minds of the Grand Jurors against Massei by Assistant United States Attorney William Koen who deliberately introduced evidence which he knew was not legally competent or relevant and could only result in inflaming the minds of the Grand Jurors against the defendant.

By his attorney,

(s) RICHARD MAGUIRE

MOTION TO INSPECT GRAND JURY MINUTES.

The defendant moves that he be allowed to examine the minutes of the Grand Jury and cites therefor the reasons as set out in his Motion to Dismiss the Indictment filed this day.

The defendant further requests a hearing on this Motion.

By his attorney,

(s) RICHARD MAGUIRE

McCARTHY, J. — May 16, 1955

Motion denied

By the Court

(s) DAVID W. WALSH, *Deputy Clerk.*

MOTION FOR A BILL OF PARTICULARS.

Now comes the defendant and moves that the Court order the attorney for the United States to file particulars stating:

(1) The source or sources of the defendant's alleged unreported income for each of the calendar years 1945 to 1950, inclusive.

(2) If the alleged deficiencies in reported income are based in whole or in part on alleged increases in the defendant's net worth, the defendant's alleged assets and liabilities as of December 31 of each of the years 1945 to 1950, inclusive.

(3) If the alleged deficiencies in reported income are based in whole or in part on alleged expenditures by the defendant, the dates and amounts of such alleged expenditures during the calendar years 1946 to 1950, inclusive.

(s) RICHARD MAGUIRE

Attorney for Defendant

McCARTHY, J. — June 6, 1955

Motion allowed only as to likely and probable source of income.

By the Court

(s) DAVID W. WALSH, *Deputy Clerk.*

BILL OF PARTICULARS.

Now comes the United States of America, and in compliance with the Order of the Court, files the following particulars for the purposes of this case only:

1. The likely source of unreported income of the defendant is moneys received by the defendant as an individual from many persons engaged in various illegal activities for the performance by the defendant of his official duties as a member of the Worcester Police Department, for the non-performance by the defendant of his official duties as a member of the Worcester Police Department, and for the performance by the defendant as a member of the Worcester Police Department of services rendered to such persons in connection with such illegal activities.

2.

Year	*Total Assets*	*Total Liabilities*	*Net Worth*
1945	$ 60,705.73	none	$ 60,705.73
1946	87,971.11	none	87,971.11
1947	99,215.69	none	99,215.69
1948	108,866.97	$5,000	103,866.97
1949	118,470.69	5,000	113,470.69
1950	155,551.25	5,600	149,951.25

Included in the total assets above recited are sums of money expended for annuity contracts with the John Hancock Mutual Life Insurance Company.

3. In addition to living expenses, the expenditures consisted in the main of the following:

	Year	*Date*	*Amount*	*Purpose*
a.	1946	Aug. 7	$26,212.40	purchase of annuity policy
b.	1947	June 26 Nov. 13 Dec. 31	6,159.21	purchase of securities
		June 26 Dec. 11 Dec. 30	6,264.24	purchase of securities

	Year	*Date*	*Amount*	*Purpose*
		Dec. 19	1,255.00	purchase of securities
		Aug. 28	1,600.00	purchase of two lots of land in Westerly, R. I.
c.	1948	Feb. 17 Apr. 2 Aug. 24	3,372.44	purchase of securities
		Mar. 25	714.35	purchase of securities
		July 13	764.59	plumbing in house, Westerly, R. I.
		June 25	1,200.00	purchase of lot of land in Westerly, R. I.
		Sept. 10	1,000.00	purchase of lot of land in Westerly, R. I.
		Apr.-June	9,966.25	house construction, Westerly, R. I.
d.	1949	June 20	1,393.15	purchase of securities
		June 15	581.75	purchase of securities
		June 15	439.73	purchase of securities
		June 17	332.77	purchase of securities
		June 15	649.29	purchase of securities
		Jan. 14	800.00	purchase of land in Westerly, R. I.
		Aug. 27	400.00	purchase of land in Westerly, R. I.
		Mar. 3	1,448.71	improvements to real estate in Worcester, Mass.
e.	1950	Apr. 12	29,947.80	annuity contract with John Hancock Mutual Life Insurance Co.
		Nov. 29	4,500.00	loan to brother

ANTHONY JULIAN
United States Attorney

By: (s) WILLIAM J. KOEN
Assistant U. S. Attorney

MOTION TO DISMISS.

This is a motion to dismiss for failure to file adequate answers to defendant's motion for Bill of Particulars.

1. Paragraph 1 of the defendant's motion for a bill of particulars reads as follows:

"The source or sources of the defendant's alleged unreported income for each of the calendar years 1946 to 1950, inclusive."

2. The Government's answer to paragraph 1 of the defendant's motion for a bill of particulars reads as follows:

"The likely source of unreported income of the defendant is moneys received by the defendant as an individual from many persons engaged in various illegal activities for the performance by the defendant of his official duties as a member of the Worcester Police Department, for the nonperformance by the defendant of his official duties as a member of the Worcester Police Department, and for the performance by the defendant as a member of the Worcester Police Department of services rendered to such persons in connection with such illegal activities."

3. The Government's answer is too general and does not allow the defendant to prepare his defense. A "likely" source is not sufficient as a matter of law as the Government must furnish direct evidence of the source of the defendant's alleged unreported income.

4. In filing this motion, the defendant does not waive his motion to dismiss based on the fact that the Government failed to comply with the Court's order to answer its bill of particulars by July 7, 1955. In fact, the Government did not file its answer until July 25, 1955, and then its answer as regards paragraph 1 as noted above was far too general to allow the defendant to prepare his defense.

WHEREFORE, the defendant moves that the indictment against him be dismissed.

By his attorney,

(s) RICHARD MAGUIRE

MOTION TO DISMISS.

This is a motion to dismiss for violation by the office of the United States Attorney of the defendant's right to a speedy trial under the Sixth Amendment of the Constitution of the United States.

1. The defendant was indicted on February 16, 1953, for alleged offenses during the years 1947 to 1951.

2. Assistant United States Attorney William Koen presented the case to the Grand Jury, and he has been handling the case for the Government ever since.

3. In May 1955 the case was assigned for trial to begin on June 14, 1955.

4. The defendant had filed a motion for a bill of particulars on March 20, 1953, and there was a hearing on this motion on June 6, 1955.

5. At the hearing on this motion Assistant United States Attorney Koen asked the Court to grant him two weeks' time within which to prepare his answer to the defendant's motion for a bill of particulars. The case had been set for trial on June 14, 1955, and, in view of this fact, the defendant in open court withdrew his request for the bill of particulars in order to eliminate any possibility of delay in the start of the trial as scheduled on June 14, 1955.

6. Assistant United States Attorney William Koen then requested that the case be taken off the list because he needed more time for preparation. This request was granted by the Court.

7. On June 27, 1955, at a subsequent hearing on the defendant's motion for a bill of particulars, the defendant again made a formal request that his case be set down for trial during August, 1955. The Court had previously announced its intention of trying another criminal matter during August, and the defendant again requested that he be granted a jury trial at that time. The request was denied.

8. On October 5, 1955, McCarthy, J. held his first call

of his criminal list since the summer. Criminal cases were to start on November 1, 1955. Defendant's counsel, Richard Maguire, had been previously assigned to start a trial on November 1st before Sweeney, J. McCarthy, J. then thereupon assigned this case for trial to begin immediately upon the termination of said case before Sweeney, J.

9. On November 1, 1955, Mr. Maguire, then on trial before Sweeney, J., was notified to appear before McCarthy, J. during the recess at 11:30 a.m. Since the trial before Sweeney, J. did not recess that day until 11:55 a.m., Mr. Maguire was unable to be present. At the hearing before McCarthy, J., the Court stated that this case must be tried and disposed of. Mr. Koen was present, and he asked that the case be continued in order that the Internal Revenue Service be permitted to conduct an investigation of the facts in the case. This investigation, he related to the Court, would take another four or five weeks. McCarthy, J. granted the Government's request and set the case down for trial in January, 1956.

10. On January 9, 1956, the case again appeared on the trial list and Mr. Maguire requested that the case be set as the first case on the list for trial. The Court stated he would not allow Mr. Koen any further opportunity to make further investigation but refused to place this case at the head of the list and set another criminal case for trial.

11. On February 27, 1956, the case was again on a list for assignment for trial. On this occasion the Court set the case for trial to begin April 3, 1956.

12. The Government's case is based on the net worth theory, so called, and under this theory it is incumbent upon the Government to prove the source of the defendant's alleged unreported income. Since May 1955 the Government has been conducting a series of further investigations in an effort to determine a source of the income allegedly unreported by the defendant.

WHEREFORE, the defendant moves that the indictment against him be dismissed.

By his attorney,

(s) RICHARD MAGUIRE

MOTION FOR HEARING ON MOTION TO DISMISS FILED FEBRUARY 25, 1953.

1. The defendant was indicted on February 15, 1953.

2. On February 25, 1953, the defendant filed a Motion to Dismiss the indictment for the reasons as set forth in said motion. He also at this time filed a supplementary motion to inspect the Grand Jury minutes. By order of the Court, these motions were impounded.

3. On June 16, 1953, the Court entered the following order: "ORDERED that an affidavit in support of said motion, setting forth the facts, must be filed within 15 days, otherwise the motion will be denied." On June 25, 1953, Richard Maguire, attorney for the defendant conferred with John F. Davis, Deputy Clerk of the Court handling Judge McCarthy's session, and John McNaught, Judge McCarthy's law clerk. Mr. Maguire explained that it was the intention of the defendant to introduce oral testimony in support of his motion, that oral testimony rather than affidavits was made necessary because of the nature of the matter and that intended witnesses would not furnish affidavits. At this conference it was decided that Mr. Maguire should write a letter to Judge McCarthy stating the necessity of oral testimony.

4. On June 25, 1953, Richard Maguire, attorney for the defendant wrote a letter to Judge McCarthy, a copy of which letter is attached to this motion.

5. Without further notice and without a hearing, on December 28, 1954, the Court entered the following order: "ORDERED that said motion be and it hereby is denied."

6. Without further notice and without a hearing, on May

16, 1955, the Court entered the following order: "ORDERED that defendant's motion to inspect Grand Jury minutes is denied."

7. The defendant respectfully moves that he be given a hearing on the motion filed February 25, 1953, and that the Court hear witnesses subpoenaed by him in support of said motion.

By his attorney
(s) RICHARD MAGUIRE

The Honorable William T. McCarthy June 25, 1953
District Judge for the District
of Massachusetts
United States District Court
Federal Building
Boston, Massachusetts

Re: United States of America
vs. William Massei
Criminal No. 53-38-M

Dear Judge McCarthy:

In the above case with reference to the Motion to Dismiss the Indictment, you entered the following order:

"ORDERED that an affidavit in support of said motion, setting forth the facts, must be filed within fifteen (15) days, otherwise the motion will be denied."

In this matter, it is the intention of the defendant to introduce oral testimony in support of his motion. Oral testimony rather than affidavits is made necessary because of the nature of the matter, and it is respectfully requested that the defendant not be required to submit affidavits at this time, but rather be given the opportunity of presenting oral testimony at the time of the hearing.

Respectfully yours,
RICHARD MAGUIRE
Attorney for William Massei

RM:bj

NOTICE TO SUPPRESS.

Now comes the defendant and moves to suppress any and all evidence of statements made by the defendant's attorney to Internal Revenue officials on the grounds that such evidence is privileged, incompetent, irrelevant and immaterial.

By his attorney,
(s) RICHARD MAGUIRE

HEARING.

Court Room No. 5, Federal Building,
Boston, Mass.
May 16, 1955.

[2] The Clerk: Criminal No. 53-38, United States v. William V. Massei.

The Court: I tell you how I feel about this, Mr. Maguire. It is an old case. I think I have to hear your motion for a bill of particulars. After all, you are another one of my boys. I had a boy before me this morning. And I know you won't ask too much. I am very proud of you boys. But the bill that is here in this case is quite late, isn't it?

Mr. Maguire: It has been pending, your Honor, since within the 20 days which I think you allowed for special pleas.

The Court: Well, tell me, why you think you ought to have it.

Mr. Maguire: Well, very briefly, the first thing I would like to determine—I don't think there is any dispute about it—is to have for the record the government's theory of prosecution is that it is a net worth case.

The Court: That is right. Isn't it, Mr. Koen?

Mr. Koen: Yes, sir.

The Court: That's right.

Mr. Maguire: And I would like to say in connection with

that, your Honor, one of the elements of the government's case on the net worth theory is to determine source.

The Court: That is right.

Mr. Maguire: Now I would like to ask that the United States Attorney be asked to specify what the source of the [3] alleged income or increases were during the years involved. I honestly don't know what is in this file. As far as we know, if your Honor please, there is no source, and, if we are correct in this, it might well dispose of the matter almost immediately.

The Court: You are asking the government to disclose its source, and, really, you are asking the government to disclose its case, aren't you?

Mr. Maguire: No, no.

The Court: What's the difference?

Mr. Maguire: No.

The Court: You've got to start, haven't you? You've got to start at a certain crossroad in this net worth case?

Mr. Maguire: Yes, your Honor.

The Court: And what you are asking them to say now is, "Tell us what you have got."

Mr. Maguire: Well, they, presumably under the Bowman Dairy decision, will furnish us with the evidentiary material.

The Court: They furnished you with matters that came within the purview of that decision.

Mr. Maguire: Yes. In addition to that,—

Mr. Koen: Has that been decided, sir, here by you?

The Court: Well, I suppose there is no way I can get away from the Bowman Dairy decision. You have read it, haven't you?

Mr. Koen: Yes, sir, I have read it. And may I [4] say this, if I may interrupt you, sir?

The Court: All right.

Mr. Koen: That in so far as the evidence is concerned,

all of the evidence which we have obtained from the defendant and all the other sources have been returned, and the defendant very well knows what evidence we have had from him.

Mr. Maguire: That doesn't answer the problem.

The Court: You have no—they haven't any documents—if you have the documents, then they don't have to comply with the mandate of the Bowman Dairy case.

Mr. Maguire: That, as I understand it,—

The Court: Pardon me a minute, sir. [A pause] As a matter of fact, Mr. Koen, if I can save time, I had the Iacone case, and it was handled by one of your associates; I tried the case, and there was a bill of particulars, and my memory is that in that case I did allow particulars in the form of a general answer filed by the government as to the general sources. That's my memory of it. Now I may be wrong. Is that what you are saying?

Mr. Maguire: I say, under the cases, we are entitled to have the United States tell us what is the source.

The Court: What do you say, Mr. Koen?

Mr. Koen: Well, of course, the answer to that is twofold. First of all, they are asking for the evidence we [5] intend to proceed on, and, secondly, they are asking us for the conclusions which we have reached on that evidence, which clearly they are not entitled to.

The Court: Well, I tell you what I think they are entitled to. A person is entitled, formally and substantially, to know what the charge is so he can prepare his defense.

Mr. Koen: Yes, sir.

The Court: There is not a bit of doubt about that. And if the government elects to proceed on the net worth theory, then the defendant would be entitled to information, generally speaking, which would show—

Mr. Maguire: If your Honor please,—

The Court: —the physical picture of what that start is. Is that what you want?

Mr. Maguire: Not so much the start, your Honor. We are interested in that, of course—the start and the finish. But we are interested in the alleged increase, as to the source of it. In other words, the burden is on the government in these cases to show it came from an income-producing source, and we are entitled, under the cases, to be informed as to what that source is.

The Court: What I don't want to do, Mr. Maguire, is to take this case and try it on a motion for a bill of particulars on issues that are germane,—on testimony that is germane to the issues at the time of trial, otherwise I will be doing a great disservice to the United States Government, [6] because, after all, they are entitled to a trial as well as the defendant.

Mr. Maguire: I certainly don't dispute that, your Honor. But I am perfectly satisfied myself, if your Honor please, we are entitled to be told. For instance, some of the cases, the Johnson case, a Supreme Court case, the source in that case was gambling houses, and I would say that if that were before your Honor today we would be entitled to know that the source of the alleged increases were gambling houses.

The Court: Suppose the source was X dollars coming from—I don't know—I don't like to go into it. You know what the theory is.

Mr. Maguire: Well, as I say, your Honor, as we understand the facts there is no source for the years involved.

The Court: Is there any way you can sit down with Mr. Maguire and come to an understanding, Mr. Koen, reasonably, as to what he might be entitled to under the decisions?

Mr. Koen: I will try to.

The Court: Why don't you try to do that, and I will continue it until next Monday?

Mr. Maguire: All right.

The Court: Please remember, Mr. Maguire, I am not going to allow inspection of the Grand Jury minutes. That I am denying.

Mr. Maguire: That I believe you had already denied, [7] if your Honor please.

The Court: Yes.

Mr. Maguire: I think there are only three motions before you this morning, as I understand it.

The Court: Inspection,—

Mr. Maguire: The Bowman Dairy, the Rule 16, and the Bill of Particulars.

The Court: All right.

HEARING.

Court Room No. 5, Federal Building,
Boston, Massachusetts.
June 6, 1955.

[2] The Clerk: Criminal No. 53-38, United States versus Massei.

Mr. Maguire: Your Honor, would you hear us at the bench?

The Court: Do you want to come up to the bench, and we will do it faster.

Mr. Maguire: I think perhaps we can.

[Conference at the bench between Court and counsel, not taken]

[Conference at the bench between Court and counsel as follows:

The Court: On the Motion for the Filing of Particulars, the Court directs the government to answer the source of revenue. I suppose that is about the way to do it, isn't it?

Mr. Maguire: Not revenue. That implies it is income.

The Court: The source of the income.

Mr. Garrity: That is right. They charge income.

The Court: The source of the income, using the phrase likely and probable source of income. I don't order the government to furnish any more than that. The rights of the defendant are saved.

Mr. Maguire: May we have this reasonably quickly in view of the trial date?

The Court: Do you want to try it next week?

Mr. Koen: No, sir. May I say this: if I have to [3] specify, as your Honor indicates in allowing Paragraph 1 of the Motion for a Bill of Particulars, then I want some time to be a little more cautious and careful in my answer than would be required otherwise.

The Court: Then I will take the case off the trial list for next Tuesday. I am not going to be caught this summer.

Mr. Garrity: This man was indicted—

The Court: Mr. Powers wanted the trial. I gave it to him, because he wanted to try it. He wasn't going to stay.

Mr. Garrity: This man has been under indictment for two and a half years.

Mr. Maguire: The short answer is: if they have the source it will take them two minutes to specify.

Mr. Koen: I think this—you are losing sight of this particular fact that the Judge stressed. What we know and don't know are two different things. What we know is one thing. If we have to specify as to likely source, then we have a right, and we should be given the opportunity of going into that, so at the trial we won't be foreclosed.

The Court: How much time do you need?

Mr. Maguire: Let me suggest, if your Honor [4] please, I would like an opportunity to consider, at least before the day is out, whether we perhaps will waive our request for particulars and go to trial next Tuesday. We are completely confident they don't have the source. If he is using this as a pretext to delay the trial—fine. I would like to think about it, before the afternoon is over.

The Court: I will be frank with you. If the government came before me and said they were conducting their investigation and wanted more time, and they weren't ready for trial, I would give it to them. I wouldn't hesitate. But someone has to ask for it.

Mr. Koen: I am asking for it now.

The Court: How much time do you want?

Mr. Koen: For time to answer Paragraph 1.

The Court: I have ordered an answer. How much time do you need? Two weeks?

Mr. Koen: Two weeks.

Mr. Maguire: Now, if your Honor please, I will state right now for the record that we will withdraw Paragraph 1 of the motion, withdraw our request for those particulars, in the hope we will get a trial a week from tomorrow.

Mr. Garrity: It has been set down for a week [5] from tomorrow.

The Court: I set it down for a week from tomorrow. But I have so many things to do. How many cases have I got, Mr. Walsh?

The Clerk: You have three coming in Thursday and four coming in the following Tuesday.

The Court: That's right. I have a long criminal case I have to start.

Mr. Garrity: If we withdraw this request, has Mr. Koen any objection to going to trial next Tuesday?

The Court: How long will this case take to try?

Mr. Garrity: Two days.

The Court: How long do you think?

Mr. Maguire: We can probably help Mr. Koen in his presentation.

Mr. Koen: Two and a half to three days.

Mr. Garrity: Tops.

The Court: I will take it off the trial list.

Mr. Koen: That is not counting cross-examination.

The Court: I have seen those two and a half to three days. They last ten days. There is one thing I am not going to do and that is be caught trying cases in July. I am certain of that. That is one thing I have promised my doctor I will not do. I have [6] to come back to go to work on the 25th of July. I am not going to interfere with this boy's vacation and with John's vacation or somebody else. When I do that I discommode, I spoil the whole vacation plan.

Mr. Garrity: This won't run over three days.

The Court: Three days?

Mr. Garrity: It is off for the month of June?

The Court: Do you still want two weeks?

Mr. Koen: Yes.

Mr. Maguire: The case is set for trial for the 14th?

The Court: It is off. If it is off for two weeks, I certainly won't be able to start the trial on the 14th. I am not going to get jammed into a case and be caught on trial like I did last summer. I got caught last year.

Mr. Maguire: May the record show we have withdrawn our request and may it further show that the government has requested that the case—

The Court: He requests that the case be taken off the list because he needs more time for preparation.

Mr. Koen: That's correct.

Mr. Garrity: Preparation for trial? Put the request back in then.

[7] The Court: All right, and they are to answer the source.

Mr. Koen: Yes, sir.

The Court: All right.

HEARING.

Court Room No. 5, Federal Building,
Boston, Massachusetts.
June 27, 1955.

[2] The Clerk: Criminal No. 53-38-M, United States of America versus William V. Massei.

The Court: You were downstairs, Mr. Koen, and Mr. Maguire filed a motion to quash the indictment, predicated upon a refusal on your part to carry out the order. I told him I couldn't quash it but that you could.

Mr. Koen: I have no memory you made an order as recited in the motion.

The Court: The order was—I suggested you file the same sort of answer filed in the Iaconi case.

Mr. Koen: That's right.

The Court: And that hasn't been filed?

Mr. Koen: No, sir, because I don't think there was any time set. If your Honor sets a time I will be glad to do so.

The Court: Ten days.

Mr. Maguire: Ten days?

The Court: I have set ten days in which that may be filed, Mr. Maguire. I really didn't set the time. I must plead guilty. I thought I made it clear.

Mr. Maguire: The transcript clearly shows it was two weeks, your Honor. Another ten days I am sure won't matter.

The Court: Ten days.

Mr. Maguire: If your Honor please, one last question—

The Court: Yes.

Mr. Maguire: I think I understood you to say you might [3] be having jury trials this August.

The Court: Oh, I am not, just on that case and no more.

Mr. Maguire: I would like to, if I may, point out to your Honor that this case, as you know, is almost three years old.

The Court: That's right.

Mr. Maguire: And the request for delay was at the request of the government. It seriously prejudices the defendant.

Mr. Koen: At the request of whom?

The Court: If the Worcester papers—

Mr. Maguire: The request for continuance of the trial this June was made by you.

The Court: This man allegedly was a corrupt police official who got his money for protection of the rackets up there in Worcester. I am very anxious to try it. I have no use for crooked cops and I have no use—

Mr. Maguire: If your Honor please, there is nothing in the record that indicates anything of the kind. We have been anxious and we are anxious to go to trial this month any time.

The Court: I understand the money came from sources where the statute has run, isn't that right?

Mr. Maguire: We are asking the government to specify the source, if your Honor please.

The Court: All right. I will order that. Will you do [4] that, Mr. Koen?

Mr. Koen: The likely source.

The Court: That's right, the same as the Iaconi case.

Mr. Maguire: If your Honor please—well, we will argue about it later.

Mr. Koen: The same as recited in the Holland decision.

The Court: I don't intend to limit the government in

its efforts to prove a case which might well come to it any minute before or while the case is on trial. You were an Assistant United States Attorney. You know it is very important to see to it that the rights of all parties are protected, one of whom is a very important personage, and that is little Mr. America, Mr. American Citizen. I am going to protect him.

Mr. Maguire: If perchance your Honor has jury trials in August I hope you will request hearing this one.

The Court: I am not going to allow Mr. Massei to tie me up. I will try it in September and give it the right of way. He is not going to tie me up during October, I mean during April, or during August rather. I have a case on for August because I figured there was an interference with a witness for the government. There is no such suggestion in your case.

Mr. Maguire: The delay, if your Honor please, is going to seriously prejudice the defendant.

The Court: I don't know how. He is a retired police [5] officer. He lives in affluence, doesn't he?

Mr. Maguire: It is three years old, if your Honor please.

The Court: He hasn't suffered much by it, has he, Mr. Koen?

Mr. Koen: I don't know what he has suffered. I couldn't tell you.

The Court: Apart from any suffering he may do or not in his own conscience. I don't want the papers to think for one minute—I put this case on because I wanted to try it the same as I tried the Iaconi case. We are a government of laws. If the government hasn't a case—I have indicated what the government has to do. I will impanel the jury so there will be a directed verdict of not guilty. Mr. Koen didn't handle the case. He didn't prepare it in the early stages. I have wonderful respect, and I know you have, for those two men back there. If ever there were two men

in the Treasury Service that are wonderful men, those two fellows are, together with another one. One has a poker face and the other hasn't. You have had a lot to do with them, Mr. Maguire—I mean from a government point of view.

Mr. Maguire: Purely social, if your Honor please.

HEARING

On October 5, 1955 McCarthy, J. held his first call of his criminal list since the summer. Criminal cases were to start on November 1, 1955. Defendant's counsel, Richard Maguire, had been previously assigned to start a trial on November 1st before Sweeney, J. McCarthy, J. then thereupon assigned this case for trial to begin immediately on the termination of said case before Sweeney, J.

HEARING.

Court Room No. 5,
Federal Building,
Boston, Mass.

[2] The Clerk: Criminal No. 53-38-M, United States of America vs. William V. Massei.

[No response:]

The Court: I want that case called, and I want the reasons given in open court—

[The Clerk confers with the Court.]

Mr. Urbano: Mr. Koen is on trial before Judge Ford.

The Court: I would like to have Mr. Koen and Mr. Maguire here at half past 11 when they are on their recess. I have that case in order for trial. Both counsel knew it was

on for today. It's an old case. That's where it's going to stand unless I am given good reasons why it should be taken off.

Mr. Urbano: Mr. Maguire is on trial, too.

[Other cases called.]

The Court: Mr. Koen, I don't see Mr. Maguire.

Mr. Koen: Mr. Maguire is on trial in the Ofgant case, which will take some time.

The Court: I sent word for him to be over here at half past 11.

Mr. Koen: I want you to know I have a jury impaneled in Judge Ford's session and Judge Ford wants me back at quarter of 12.

The Court: I will wait five minutes. If he isn't here we will break in.

[3] [Other cases are called.]

The Court: Mr. Koen, I won't wait. I have notified Mr. Maguire to be over here. His office knew this case was on.

Mr. Koen: He is on trial, sir.

The Court: He has three or four associates. Mr. Garrity is with him over there?

Mr. Koen: No, sir.

The Court: When the case was called this morning for trial—I put this case down as the number one case to be tried because of reasons I have expressed. Those reasons are reasons which I don't feel I should repeat. I think everyone knows it's an old case and it's a case that has been on the list several times, and it's a case that arises out of a situation which, I think, necessitates a trial, one way or the other.

Mr. Koen: I agree.

The Court: And I have it on the list for trial and I would like to have the case tried. You know I have a wholesome respect for an office in which I spent many

happy days, and some of my unhappy days, and as I look back over my associations with you they have been most pleasant. Therefore, in spite of that, I must say—the case is on the list for trial, and you are the head of the criminal division.

Mr. Koen: In view of my engagement before Judge Ford, [4] and in view of Mr. Maguire's present engagement before Judge Sweeney, and in view of the fact that as late as yesterday afternoon that trial was supposed to take two weeks, and my present commitment in front of Judge Ford will carry me well beyond November 10, and after that I am in Judge Wyzanski's session and after that Judge Aldrich's session, I don't see, sir, how with my commitments I can try it during this term.

The Court: I come ahead, I think, of Judge Aldrich because I have been on the bench longer.

Mr. Koen: That, sir, I will leave with the Court.

The Court: I think I do. I'm not stepping on Judge Wyzanski.

Mr. Koen: There is this other thought.

The Court: I have this case to try. I want the case tried and disposed of.

Mr. Koen: There is this other thought—

The Court: If you have any difficulty I will speak with the Judges.

Mr. Koen: May I say this to you, sir? Maybe you in your wisdom will take what I deem favorable action. Because it is the type of case that it is I have asked the Internal Revenue Service to conduct a reinvestigation of the facts preparatory to trial. They have acted on my suggestion and they are now in the process of reinvestigating the case, and Mr. Pastore, who is handling it, informs me it will take at [5] least three or four or five weeks to do what I have asked them to do and make it the subject of a report. In view of that, if your Honor has no objection,

and I admit it's an old case, and it's the oldest case I have assigned to me and I want to get rid of it one way or another, if your Honor is bringing a jury in in January may I suggest a firm commitment as the first trial in January to a jury?

The Court: I want to say, Mr. Koen, that I have had calls come to my lobby about it.

Mr. Koen: And me, too, sir.

The Court: And they have come from the newspapers. And I don't want to have—it's an old case, and apparently, whatever their interest is, it's not my business, but the fact is that it's an old case and the fact is it's a case that ought to be tried, and the fact is the charges are serious charges, and the fact is that the government should have its day in court and also the defendant should have his day in court, and Mr. Maguire has asked for a quick trial.

Now I tell you what I'll do. In the light of the fact you, representing the sovereignty of the United States, and the Internal Revenue Department are making a reinvestigation in order to get a revaluation of the testimony and in order to prepare itself for trial, I will now set the case down for trial to follow a civil case that goes on trial the third day of January. I have already assigned one case. I may put [6] this case first. I have assigned one because I think the representation was made that some witness would be out of town and he would be available at that time.

The government will have to be ready. Will you be ready by that time?

Mr. Koen: Yes, sir.

The Court: And, Mr. Walsh, will you make it perfectly clear to counsel that there is to be no interference with that date? I have now relieved everyone from assignments they may have with other judges. Judge Aldrich may have anyone with my enthusiastic approval. But I have to carry on here. And I will be very cooperative. But at this date,

no matter whether counsel is available or not, the case will go on trial.

I would like to have you notify Mr. Maguire that that is so—he is on trial in another session—he must make arrangements to have someone from his office try it. And Mr. Koen, if you are on trial in another session, you will have to make arrangements with the United States Attorney to have someone else try it.

Mr. Koen: The Good Lord willing, I will be here, sir.

The Court: That's the spirit. That case will follow the Bullock case.

HEARING.

Court Room No. 5
Federal Bldg., Boston
January 9, 1956

[2] (Conference at the bench.) (Not reported.)

(Further conference at the bench:

Mr. Maguire: We have been pressing now since—

The Court: I put these cases right on the list for trial myself. I ordered the Clerk to prepare this list. I relieved the United States Attorney's office of the possibility of embarrassment because they have cases other judges have. I was delayed today because I was laid up. I will try it, to follow along reasonably.

Mr. Maguire: May it appear on the record the defendant strenuously objects to not being granted a trial the first case on his Honor's list. His rights have already been seriously prejudiced.)

(Further conference at the bench.) (Not reported.)

(Further conference at the bench:

The Court: Here is a man who admittedly violated the obligation he owed his community and followed the corrupt highway—

Mr. Maguire: I strenuously object to your Honor's remarks.

The Court: We will go to trial. I will not give Mr. Koen any further opportunity to make any further investigation. It is a question of my trying to get the list fixed up so that I can handle the criminal cases, [3] together with a very tough civil case where there has been a definite hardship, and I have to get those in if I can. I have a case where a man is in very bad shape physically and any further continuance might cause him harrassment. I want to try the Luckenbach and Godshall case next. I will not come in until Thursday, to see if I can get myself in shape. I will keep this on the trial list. You can be sure of that.)

HEARING.

Court Room No. 5,
Federal Building, Boston,
February 27, 1956.

[2] The Court: I am going to assign these cases for trial and I am going to assign these cases for trial, particularly the so-called tax cases. Tax cases are cases which must be determined with consideration for the time of the United States Attorney's office because of the necessities that arise from the presence in the court room of special agents of the Treasury Department.

You probably do not realize how many of the men engaged in this work are men who are obliged to prepare several cases at one time.

So that I am going to fix the schedule, I am going to have the list called and I am going to have the time fixed and I am going to leave it reasonably to the discretion of the prosecutor's office, which is the only sensible way it can be handled because of the inescapable fact that these men have to have several cases to try. Then in addition to that, Government agents cannot be in two or three court

rooms at the same time and neither can they be compelled to prepare a case and have it ready for trial, and have another one ready for trial.

The cases are going to be assigned in order to give the Government an opportunity to prepare them so that the Government will have its day in court and the defendants will have their day in court.

We will fix the time and you will get probably no more [3] than a few days' notice.

I am obliged to draw a new jury some time the latter part of next week and I am not starting these cases until the 2nd of April, but that will be the latest. The third day of April the cases will start but they will start with the first case to be called now.

[Whereupon the Clerk called the case Criminal 53-384, U. S. of America v. Massei.]

Mr. Cohen: May that be assigned for April 3?

The Court: The first case to be tried—counsel may get ready to try it and that is a fixed date, the date the Government will be ready, and the Government has asked for more time to make an investigation. They now say that they are ready and that case is fixed for trial on the 3rd day of April.

Mr. Maguire, I would like to make it perfectly clear, barring serious sickness, you will have to be here on that date.

STENOGRAPHIC RECORD OF TRIAL.

Court Room No. 6
Federal Building, Boston
Monday, April 2, 1956
10:30 a.m.

[2] The Clerk: No. 53-38-Criminal, United States versus William V. Massei.

* * *

[9] The Clerk: No. 53-38-Criminal, United States versus William V. Massei.

Mr. DiMento: The Government is present, your Honor.

The Court: All right. Ready for trial?

Mr. DiMento: Mr. Koen should be here at the time of the impaneling, your Honor.

The Court: All right.

[10] Mr. Maguire: There are some motions that haven't been disposed of yet.

The Court: Are there?

Mr. Maguire: And when they are disposed of, I think it ought to be out of the presence of the jury.

The Court: Well, will counsel come up?

[Colloquy at the bench, during which the following is recorded:—

The Court: What are they?

Mr. Maguire: The first is a motion to dismiss for failure to file answer to the bill of particulars within the time allotted by the Court.

The second is a motion to dismiss because the answer to the bill of particulars is too general, for the reasons set forth.

The third is a motion to dismiss on the Sixth Amendment in that he wasn't granted a speedy trial and because the United States Attorney continually in the last nine months asked for continuances in order to

re-investigate. And then—may this be off the record?

[Statement off the record.]

The Court: I will allow your letter, Mr. Maguire, to be attached to it, but I am not going to allow your motion. I dismiss it, and your rights are saved.]

[This case was again called in the morning session.]

[11] The Clerk: United States versus William V. Massei.

The Court: While you were away, Mr. Koen, Mr. Maguire presented to me a motion. Here it is. A motion for a hearing and a motion to dismiss, filed February 25, 1953, which I have dismissed.

Mr. Koen: Which motion you previously dismissed.

The Court: Previously dismissed, that is right. Now he has presented this motion and he has attached to it a letter addressed to me which contains the order—[reading]. What was the date of the dismissal of this before?

Mr. Maguire: It is set out in the—

The Court: It was dismissed after this was filed, wasn't it?

Mr. Maguire: That letter is dated June 25, and you dismissed the motion on December 28.

The Court: That's right. So that order not having been complied with, I dismissed it and your rights are saved.

Mr. Maguire: And may I have included in support of this motion the docket entries that pertain thereto, your Honor?

The Court: That's right. But I made an order that you reduce it to affidavit form and it wasn't carried out, and I still gave you time in which to do it and didn't act upon it until December.

Mr. Maguire: And, I take it, the letter addressed to you is now part of the record?

[12] The Court: That's right. Now what else have we?

Mr. Maguire: You have a motion. Perhaps if your Honor would look at it [handing], that is the motion.

The Court: You have given Mr. Koen a copy.

Mr. Maguire: Well, that has been filed. This is a motion to dismiss for failure to file bill of particulars within the time allotted by the Court.

The Court: The Government did file.

Mr. Maguire: Not within the allotted time, if your Honor please.

The Court: But they filed it finally.

Mr. Maguire: They finally filed it, yes, as set forth there, I think.

The Court: That's right. So I will dismiss that.

Mr. Maguire: There again, may we have the requisite docket entries?

The Court: Yes.

Mr. Maguire: Fine. Now the next one, if your Honor please.

The Court: If that wasn't sufficient, then you had a right to file a motion for information, and you didn't do it.

Mr. Maguire: Well, I did, if your Honor please. That's the next motion [handing]. This is a motion to dismiss because the answer to the bill of particulars was too general.

The Court: [After perusing] This motion I haven't [13] acted on.

Mr. Maguire: That's correct, sir.

Mr. Koen: There has never been any request it be acted on, sir.

The Court: That's right, there has never been any request, and I'll act on it now.

Mr. Maguire: Request by either side.

The Court: I'll act on it now and deny it and save your rights.

Mr. Maguire: All right. I now have a motion for dismissal based on the fact that the defendant was not granted a speedy trial. Here is a copy of it, your Honor [handing].

Mr. Koen: There is the original.

The Court: When was this filed?

Mr. Maguire: Friday.

The Court [after perusing]: Is this the first time you have seen it?

Mr. Koen: No, I saw it Friday afternoon.

The Court: Are you prepared to have it argued now?

Mr. Koen: Yes, sure.

The Court: All right. Are there any jurors here?

The Clerk: I think there are.

The Court: I do suggest to members of the jury that I have reached a point now where I am going into some special motions on a case that is going to be—upon the assumption that [14] I do not allow the motion and the case will be reached this afternoon; and so that you will be free from prejudice and bias, I am going to ask you kindly to go to your luncheon and come back at quarter-past two. Any other jurors that are here now may leave, that are apt to be called. [A pause.] No jurors here. Well, they are all gone. I want to make that perfectly clear. There isn't any citizen that has been brought in for jury service that's present in the court room.

I will hear you, Mr. Maguire.

Mr. Maguire: This, if your Honor please, is a motion to dismiss for violation of the defendant's rights under the Sixth Amendment to a speedy trial.

The defendant was indicted on February 16, 1953, for alleged offenses during the years 1947 to 1951. Mr. Koen, who is presently handling the case, presented the case to the grand jury and has been handling the case for the government ever since.

In May of 1955—last May, if your Honor please—this case was assigned for trial; definite assignment date, June 14, 1955.

The defendant had previously filed a motion for a bill of particulars which had not, up to this time, been acted

upon, and there was a hearing on this motion on June 6, 1955. At the hearing on this motion Mr. Koen for the Government requested two weeks' time within which to prepare his answer to the [15] bill of particulars. The case meantime had been set for trial June 14th. I, representing the defendant, stated that we would waive the answer to the bill of particulars in order not to upset this June 14th trial date. The Government then stated in open court, or requested that the case be taken off the list because he needed more time for preparation.

On June 27, 1955— Incidentally, I have the transcripts, if your Honor pleases, which I—

The Court: No, that is perfectly all right, Mr. Maguire.

Mr. Maguire: On June 27, 1955, there was a subsequent hearing on this motion for a bill of particulars.

The Court: Could I see a transcript, by the way?

Mr. Maguire: Certainly. [Handing.]

The Court: I think one of the reasons why I took that case off the list for June 14th was because I was in the midst of a very important trial, I think.

Mr. Maguire: June 14th, if your Honor please, according to that transcript, it was taken off at the request of the government.

The Court: No, but what I mean, I think I was. I'm not sure, but I can check.

Mr. Maguire: In any event, since we were not granted a trial on June 14th, we did persist in getting an answer to our bill of particulars. So that there was a subsequent hearing on [16] June 27, 1955, where again we made a formal request that the case be set down for trial in August. The Court had previously during this hearing announced it was going to try a criminal case in August, and we asked if we could not have our case assigned at that time.

On October 5, which I believe was the first call of your criminal list since the summer recess, the cases were

supposed to start, the first case, on November 5. I was then engaged or previously assigned to a case before Judge Sweeney, and this case was assigned to begin immediately upon the termination of my engagement before Judge Sweeney.

Then I set forth in a motion, in Paragraph 9, that I was requested by his Honor to appear here November 1st, at 11:30, during the recess. At that time, the recess in Judge Sweeney's session did not occur until about 12 o'clock, so that I and the defendant were not represented; but according to the transcript at the hearing, the Court, you stated, "This case must be tried and disposed of." Mr. Koen, who was present, asked the case be continued in order that the Internal Revenue Service be permitted to conduct an investigation of the facts in the case. This investigation, he related to the Court, would take another four or five weeks. The government's request was granted, and the case was set down for trial in January.

On January 9th, 1956, the case again appeared on the trial list, and I, representing the defendant, requested that the [17] case be set the first case on the list for trial; and at that point you stated, the Court stated that you would not allow Mr. Koen any further opportunity to make further investigation—but the case was not placed at the head of the trial list.

On February 27, the case was again on the list for assignment, and at that time the case was set for trial on April 3rd, which is today, or tomorrow, if your Honor please.

I would like to introduce, if your Honor please, the transcripts that I have referred to of June 6, 1955, June 27, 1955; November 1, 1955; January 9, 1956; and February 27, 1956. I would like the opportunity to present at a later time the transcript of October 5, 1955. Mr. Hunt, who was the stenographer at that time, as your Honor knows, has been

quite ill, and I expect very shortly we will have it. And with that proviso—.

The Court: Mr. Maguire, let me say this to you. The record—for example, on the assumption these are matters properly for consideration by the Court of Appeals, certainly any transcript taken under the mandate of the statute by a court reporter is a transcript that would be properly before the Court of Appeals and could be made a part of the record. If there is anything about that record, that transcript that wasn't complete, it would be the right of the government to correct it. So that an order isn't necessary so far as I am concerned, any more than an order is necessary to have a transcript of testimony taken during a trial.

[18] Now, if you remember, also in this motion the last time that you—I can remember the situation very, very clearly. I was having—there was some evidence of interference in a criminal case with a witness of the government, and we were afraid, we were reaching a season of the year when judges have to take a vacation, and it was obvious there was an attempt to bridge the chasm over July. I can remember very well that you were here. There is no need of going into that case because that case was disposed of. But I said that I would come in here in August and try that case. Now, it was a reasonably short case. And when I said that, you immediately offered a motion orally that I proceed with this trial after that one, where I had made it perfectly clear that my only reason for coming in was an emergency that certainly didn't apply to your case, and I made it very, very clear in this transcript that I did not intend to try any other case except that case. I indicated to you that I would try it in the fall. I don't remember any motion that was ever filed by you for a speedy hearing in the fall. Isn't that right?

Mr. Maguire: There has never been any motion—

The Court: That's right.

Mr. Maguire: —formal motion or written motion until today. That's right.

The Court: There never was a request on your part to have this case assigned for trial. Every time I put this [19] case on the list it was done by myself; that is, no one asked me from the United States Attorney's office, and the responsibility of getting a case on the criminal list is the responsibility of a judge, and I put this case on the list and made it the No. 1 case to try. No one from your office ever requested that the case be tried. Finally, I put that case on the list for assignment in 1956, if you remember.

Mr. Maguire: '55, if your Honor please.

The Court: '55.

Mr. Maguire: May, 1955.

The Court: That's right. I put it on, and I marked the case for trial. I said I was going to try non-jury cases, that I wasn't certain whether or not I was going to be around. If I were certain I was going to be around in March—I usually try to get away for a couple of weeks—I would have tried this case in March; but I didn't know—my doctor had told me to go but I had too much work to do, and there were other reasons why I didn't go away. I decided I'd stay around here. I had solid reasons, one solid reason in particular, and it was associated with my duty as a judge. I put this case then down, fixed the time for the 2d day of April. I said, if I went away, I would probably come in the 2d day of April because a jury could not sit beyond the 14th or 15th of March, that is, I couldn't have a jury go over beyond that date, any more than I can have this jury go beyond the date of about the middle of September. I must excuse this jury some time in September. I think it is [20] the first week. And what I usually do, when I finish with the summer, I discharge them.

So, I have had no affidavits and no requests for a trial predicated upon urgency, or predicated upon any right under the Sixth Amendment, until today. Isn't that right?

Mr. Maguire: No, if your Honor please, since last June, 1955—

The Court: That's right.

Mr. Maguire: —we have pressed for a speedy trial on every occasion—

The Court: When?

Mr. Maguire: —we appeared in court.

The Court: When?

Mr. Maguire: We pressed for the speedy trial, if your Honor please, on June 6th.

The Court: I know that. But I mean when after June 27th?

Mr. Maguire: October 5th, November 1st,—

The Court: I put the case on the list for October 5th, didn't I?

Mr. Maguire: It was to be the first case—

The Court: That's right.

Mr. Maguire: —after November 1st.

The Court: That's right. It was to be the first case on November 1st; isn't that right?

[21] Mr. Maguire: That is correct.

The Court: Then isn't it true, Mr. Koen, that you said there was an investigation being made?

Mr. Koen: Not on November 1st, sir. My memory goes back to November 1st, that Mr. Maguire was engaged before Judge Sweeney and he asked that the matter stand until he completed the trial which he was then conducting before Judge Sweeney. Then the matter came again on November 1st. I came in here, sir. I was engaged before Judge Ford, as I remember it, and that was the time that I stated to your Honor, not as recited in the motion of the defendant that I wanted to investigate. The transcript shows that I

asked for time to have the Bureau of Internal Revenue *re-investigate* the case, and I think there is a big difference between investigate and re-investigate.

The Court: I think that is right.

Mr. Koen: Then, if I may, with all due respect, sir,—

The Court: What page of the record are you reading from?

Mr. Koen: I am reading from the transcript, stenographic record of the proceedings of November 1, 1955, and I am dealing with page 4 of that record, on the fourth line from the bottom of that page.

The Court: Will you read it into the transcript?

Mr. Koen: Yes, sir, I'll be glad to.

[22] The Court: I want it read so that I will know that it is.

Mr. Koen: I had previously been discussing with you my commitments with the other judges, referring to Judge Ford, Judge Wyzanski, and Judge Aldrich, and you said: "If you have any difficulty, I will speak with the other judges." Then I said:

> "May I say this to you, sir? Maybe you in your wisdom will take what I deem favorable action. Because it is the type of case that it is, I have asked the Internal Revenue Service to conduct a *re*-investigation of the facts preparatory to trial. They have acted on my suggestion and they are now in the process of *re*-investigating the case, and Mr. Pastore, who is handling it, informs me it will take at least three or four or five weeks to do what I have asked them to do and make it the subject of a report."

Then, if I may, with all due respect to your Honor's statement and your Honor's memory, I have a very vivid recollection of what transpired on the 27th of February, when this case was on the list. When the case was called, and without any comment from you, sir, I asked that it

be specifically assigned for trial the first Tuesday in April, and you made the statement that your jurors were coming in on that day, and [23] I said I would be ready for trial, and I am ready for trial.

Mr. Maguire: If your Honor please, since last June—

The Court: No, we are up to June. Was there any other time since November 1st, Mr. Maguire, that you appeared before me with a motion for a speedy trial?

Mr. Maguire: I will just list again the dates which will show, if your Honor please, that since last June—

The Court: No, no, I mean from that date in November up to the date I assigned this case for trial at the request of the United States Attorney, when someone from your office—I think Mr. Garrity was here. I don't think you were here. Is that right?

Mr. Maguire: On November 1st I don't believe anybody was present.

The Court: No, no, I mean in February, when I assigned it for trial.

Mr. Maguire: I believe I was, if your Honor please.

The Court: Yes, I assigned it for trial at the request of Mr. Koen on November the 2d or 3d, and may it be said for the record that if he hadn't made the request I would have assigned it anyway. Now, between November the 1st and that date, did you appear before me on any motion to advance this case for immediate trial?

Mr. Maguire: On January 9th, if your Honor please, 1956, the case again appeared on the trial list, and I requested [24] the case be set as the first case to be tried.

The Court: Let it be noted that at that time I had no jury, if you remember. I notified you at that time that I had no jury and I didn't know when the jury would come in, but as soon as I resumed my jury trials, in view of the long list of non-jury cases that I had, and if I didn't go on a vacation, and didn't take the time off in March, I

would assign the case for March, but I would know later on, but at all events I would certainly assign it and give it the right of way. And then later on Mr. Koen came in and made the request.

Mr. Maguire: If your Honor please, if I may correct you, I believe that you did assign after Jan. 9, within a matter of a few days, the case of United States v. Luckenbach and United States v. Godshalk, and at that time we requested that our case be given precedence.

The Court: I assigned the Luckenback and Godshalk cases because I was told there were going to be pleas. There were pleas of Guilty in those cases, and those were disposed of around that time. I did that because both counsel said there were going to be pleas of Guilty. So if anyone indicates in any of these other cases that their client is going to plead Guilty, I'll take their pleas. That's all that meant. There wasn't to be any trial on the Luckenbach and Godshalk cases at that time. So, apart from that time, Mr. Maguire, you haven't appeared before me with any motion for a speedy trial.

Mr. Maguire: Well, I have recited it every time the [25] case—

The Court: No, no, I mean—let's get down to brass tacks—I mean when you were here in January it was clear that there was no jury, no jury sitting here. I am not trying to box you now, I am trying to state what is the record, and that I merely said to you at that time that as soon as I resumed the jury trial, this case would get the right of way. Now the first time that I have had the jury trial since that date is today,—the first time I have had a chance to sit on jury cases because I have been sitting on non-jury cases.

Mr. Maguire: Well, if your Honor please, it's the defendant's position that since May of 1955 h has been pressing to get a trial.

The Court: Well, we are all—

Mr. Maguire: It has been continued to his great prejudice time and again at the request of the government for further investigation.

The Court: I will deny this motion and save your rights.

Mr. Maguire: Do I understand, if your Honor please, the transcripts that I have referred to are now part of the record?

The Court: No, they would be part of it anyway, Mr. Maguire, wouldn't they? If any order is necessary later to make it such—I don't think any order is. Am I right, Mr. Clerk?

[26] The Clerk: They are all part of the record.

The Court: That's right.

Mr. Maguire: And the various docket entries, if your Honor please, are a part?

The Court: Oh, yes. As a matter of fact, they are a matter of public record and anyone has a right to look at them.

Now I am going to impanel the jury this afternoon at quarter-past two, and then I am going to impanel a jury following that in the Pisano case. I am going to do that to suit the time of the jurors so that those who are not drawn will not have to be hanging around.

[Adjourned at 2:15 p.m.]

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[27] AFTERNOON SESSION.

The Clerk: 53-38 Criminal, United States v. William V. Massei. William V. Massei, you are about to be set to the bar to be tried and these good men whom I shall call are to pass between the United States and you upon your trial. If you should object to any of them, you must do so as they are called and before they are sworn.

No. 16, Stewart Hawkins; No. 17, Robert S. Howell; No. 10, Crispi Falconeiri; No. 32, John W. Sullivan.

The Court: He was excused. I gave him a deferment.

The Clerk: No. 34, Ray D. Wells, Sr.; No. 14, Edna M. Griffin; No. 12, George S. Foster; No. 2, Agnes H. Arsenau; No. 25, George W. McCormack; No. 13, Helene E. Geagan; No. 35, William F. Wyman, Jr.; No. 8, Margaret N. Delaney; No. 24, George McCafferty.

The Court: I would like to say, when the jury is satisfactory, I intend, so counsel will have in mind their challenging rights, I am going to exercise my judicial discretion; I am going to have 14 jurors.

Mr. Koen: That meets with my approval, sir.

The Court: May I have the papers?

[The Clerk hands the papers to the Court.]

Now, Ladies and Gentlemen of the Jury, you have before you for trial an indictment in five counts in which the defendant William V. Massei of Worcester is the defendant. If any of you [28] are conscious of any bias or prejudice arising out of any friendship or relationship by marriage or other to this defendant, who comes from Worcester, if you are conscious of any bias or prejudice arising out of the employment by the United States Government of any member of your family, in any branch of the government service, if any of you—don't misunderstand me, now—these matters are going to be inquired into very privately at this bench, with no one but myself, and this latter one is of importance—if you are conscious of any member of your family or if you are conscious of anything, directly or indirectly, either to yourself or any member of your family, which would create in your mind a feeling of prejudice against the United States Government because of any investigation that has ever been conducted by any agency of the United States Government in connection with any

alleged or suspected violation of a federal statute, it would be your obligation to tell me about it.

Now, will counsel come to the bench just before I finish?

[Conference at the bench.]

[Further conference at the bench:

The Court: The Court has indicated a willingness to ask the jury whether or not any member of the jury would have any prejudice because the defendant had been a police officer and was retired. And, Mr. Maguire—

Mr. Maguire: I would have no objection to that, [29] in that form, your Honor; no. It doesn't matter to me.

The Court: You can do whatever you want to do.

Mr. Maguire: It doesn't matter.

The Court: Do you want me to?

Mr. Maguire: Whatever you think is right.

The Court: Whatever you think is right. Whatever you want me to do, I will. I will do what you want me to.

Mr. Maguire: Never mind it.

Mr. Koen: What was the answer?

The Court: The answer is no. Have I covered everything?]

The Court: If you are conscious of any bias or prejudice, either for or against the government, because of any friendship or association with Mr. Koen, with Mr. DiMento or with the United States Attorney himself or any of the members of the office force of the United States Attorney's office or if you are conscious of any bias or prejudice arising out of any friendship or association with counsel for the defendant, Mr. Maguire, or with any of his associates, I think it is your duty to tell me about it, and don't misunderstand me. I have had members of the jury come up and explain to me exactly what their feelings were. Then

after they have done it I have said to them, "Well, do you feel that that would interfere with the obligation that is yours as a good citizen to apply the law and to make a decision [30] without prejudice?" You are far better off coming up now and speaking to me about it than you would be later on. Don't let anything bother you. Whether it is a criminal case or whether it is a civil case, just come up and tell me about it and I will be happy to have any of you come up now.

Not having heard any response from the 12 fine ladies and gentlemen who have been drawn for service here, I am going to rule you are indifferent.

Now, let me say to you parenthetically, this, because I think it is important: You have heard me say many, many times today, and it never becomes repetitious; I wish it could be said every minute of every hour of the 24 hours, I wish there was some minute man or minute woman who would do that because they are very precious—we are a government of laws and it is the fundamental right of the government, without giving any reason, to challenge up to a certain number, and it is the corresponding right of counsel for the defendant to do it. If they didn't do that, they would put that flag at half mast, so please do not feel it is a reflection on your character, not a bit. Whatever their reasons are, the person who walks from that jury box back to one of those rear seats and sits beside one of his fellow citizens, he shouldn't feel disturbed because it is a formula that is as old as our system of jurisprudence. I say that to you so that you will not feel bad about it, and I say it before counsel exercise their right of challenge. [31] [Mr. Koen confers with Clerk.]

The Clerk: Stewart Hawkins and Edna M. Griffin, you have been challenged by the government. Will you please return to the back of the room?

No. 6, Edmund G. Crowley; No. 20, William M. Keeffe.

Mr. Koen: Government is content.

The Court: Now, Mr. Crowley and Mr. Keeffe, you have heard what I said to your fellow members of the jury, haven't you? [Indications of agreement.] Without being repetitious, if you feel you want me to talk to you or you want to speak to me in connection with what I have said, do not hesitate to come up. [No response.] Not having received any response, I am going to hold that the two jurors are indifferent, that they are free from prejudice.

[Mr. Maguire confers with the Clerk.]

The Clerk: Ray D. Wells, Sr. and Margaret M. Delaney, you have been challenged by the defendant. Will you please return to the back of the court room?

No. 18, Stephen J. Kaesmann; No. 26, was excused; No. 37, Jacob L. Zuckerman.

The Court: Gentlemen, Mr. Kaesmann and Mr. Zuckerman, you heard what I said to the other members of the jury. Now you, without being unnecessarily repetitious, if you are conscious of anything that bothers you, why, just come up and tell me. [No response.] Not having heard a response, I find that [32] they are indifferent.

Are counsel satisfied?

Mr. Koen: The government is content, sir.

Mr. Maguire: Defendant is content.

The Court: Now I will call two alternates.

The Clerk: No. 11, Jeremiah Foley; No. 29, Charles Paulo.

The Court: Now, Mr. Foley and Mr. Paulo, you heard what I said to your associates. If you are conscious of any bias or prejudice, in the light of what I have said to them—you are not? Well, I am going to find that they are indifferent.

Mr. Koen: I am content.

Mr. Maguire: Content, your Honor.

The Court: Don't misunderstand me. I have you in

case one of the jurors is taken sick or there is some circumstance that might happen and then, in the order, the 13th juror would step up.

I understand, Mr. Koen, you would prefer to make your opening tomorrow morning?

Mr. Koen: If that is what the Court wishes, that's all right with me, sir. It probably would be better.

The Court: I will do whatever you feel.

Mr. Koen: I think it might very well go over until the morning.

The Court: All right.

[33] Mr. Koen: It is now quarter of four and I certainly couldn't finish before four o'clock.

The Court: That's right. I don't want to have it divided. I appoint the No. 1, Mr. Crowley.

The Clerk: Mr. Crowley, you are appointed foreman of this jury. Will all the jurors please rise and raise their right hands?

[The jury is sworn.]

The Court: It is my usual policy to pick the No. 1 man or the No. 1 lady that is drawn as the foreman or forelady. And I would like to say this to you, and I say it with no suggestion that there is anything out of the way at all, but I say it out of deference for the protection of this defendant and for the protection of the United States, that if there is any circumstance during this trial, no matter what it is, that causes any of you any bother, without consulting with anybody I would like to have you speak to your foreman and I would like to say to you, Mr. Crowley, without consulting with anyone you indicate to the Deputy Marshal you desire to talk to me.

Then I want to say to counsel for the defendant and counsel for the government that if a situation like that should develop I take the position you would be entitled to know if I thought it was important. Probably I would tell

you about it—I think you are entitled to know what it is, but I think that is the better way to do it and I do that in all cases, civil and [34] criminal, so this will indicate, without the necessity of repeating it again, in all cases that will be the rule.

Now, I am going to let you go until tomorrow morning, at 10 o'clock and I am going to ask you to just keep your minds free from all forms of prejudice. One of the difficult things, you know, as you go through jury service here, it is the irresistible impulse to go home and say, "You know, I sat on such and such a case", and you go home and some lovely member of your family will say, "This is what you should do—" and before you know where you are, you have a little bit of prejudice.

It is very, very important that you free your minds from that because you are dealing with sacred rights and sacred privileges and when you leave this court room, forget about the testimony. Try to remember it, but refuse to discuss it with anybody, no matter what the occasion is. If you do, you will have a very, very happy jury service.

Another thing to do is to refrain from discussing it one with the other. That is a rule that I have found is observed sometimes in its breach, and I want to tell you frankly that on the occasions that there has been a violation of that rule, unconsciously there has been an injustice practiced. Mr. Foreman, if anyone does that I want you to report it to me. It is a very, very serious thing. Keep your minds free from prejudice. I know you will because I know that you represent a fine body of citizens and you can be sure that this defendant [35] will get a fair trial. He will get the kind of a trial that the laws and Constitution of the United States intend he should have, and by the same token I will assure the sovereignty of the United States that it will have its day in court. There are certain responsibilities that are important and they are very, very able young men that

representing this defendant, Mr. Maguire and Mr. Garrity. There is a very able prosecutor, and he has a very able young associate. All these three men, with the exception of Mr. DiMento, are men that were known to me when I was United States Attorney. They occupied a very, very confidential relationship with me and I have a great deal of respect for them.

It is very important, as you think of these precious values, that you do not get into a side road. That is the side road which has a dead end to it. You get up against a blank wall and that is the end where you get yourselves into a state of mind where you say, "Oh, that fellow, he wasn't too hot" or, "He made this mistake," or, "He made that mistake," I think, when we get before the judgment seat of the Almighty, we are going to be judged by our mistakes. If we had to compete with all these fellows that have tight halos, we wouldn't have a chance.

I hope that counsel will find no objection to what I am saying because it will help to make this trial a comfortable trial.

[36] God bless you, and, God willing, I will see you tomorrow morning at 10 o'clock.

[Adjourned to Tuesday, April 3, 1956, at 10 a.m.]

[37] SECOND DAY

Court Room No. 5
Federal Building, Boston
Tuesday, April 3, 1956
10:00 a.m.

[A jury is impaneled in the case of United States v. Adam Pisano, following which this case was called and counsel were requested to come to the bench, during which the following was recorded:—

The Court: Of course, I want to say to you gentlemen—Mr. Traverse doesn't know, and Mr. Walsh is away—but I

think that the record shows that you came before me—I mean Mr. Maguire, for the record—during January 9. I think it is covered in the motion.

Mr. Maguire: I think that was the date, your Honor.

The Court: My memory is that I was trying some jury cases—Mr. Hurley has gone up to bring down his check notes—because I don't think I started trying non-jury cases on that day, right away. I wanted him to break in on jury cases, and I think I had some jury cases that I sat on, and I think I sat on those jury cases during the month of January. I think we impaneled in a lot of them, and some of them went to the jury. So it is true that you did come before me. I don't remember Mr. Koen asking for time at that time. Did he?

Mr. Koen: I don't know whether I was here, sir.

The Court: I don't think so. I don't think you were.

[38] Mr. Koen: Was I?

Mr. Maguire: I am quite sure there was no request by the Government on January 9.

The Court: No, I don't think so either. I don't think there was. I am quite sure there was no request on your part for a trial right away, was there?

Mr. Maguire: There was, your Honor.

The Court: That month?

Mr. Maguire: On January 9th, we asked for it to be the first case to be tried. The transcript shows that.

Mr. Garrity: Would you like me to get that?

The Court: Why don't you?

Mr. Maguire: I am sorry, I left it in the office.

Mr. Garrity: Well, I can telephone.

The Court: Well, I want to straighten out the record. I said that yesterday.

Now another thing before us is this. I have a member on this jury that has made a request—Mr. Zuckerman. He is hard of hearing.

Mr. Travers: No. 11.

The Court: He asked to be transferred fron. the back row to the front row. Now of course I had no—, apparently he didn't express any physical disqualification. I have fourteen men and women that are set up for jury service in this case, so I can solve it very easily. I don't want to hurt his feelings [39] because I think a fellow who is hard of hearing is pretty apt to be sensitive.

What do you want to do?

Mr. Maguire: It depends on how deaf he is, I suppose.

The Court: That's right.

Mr. Maguire: And without running a test, how do you know?

The Court: You mean it is a double-edged sword: it might hurt you or help you?

Mr. Maguire: That is right.

The Court: On the other hand, I am interested to have you know it because I will want counsel for the defendant to know that he is entitled to a trial that the Constitution and the laws of the United States guarantee to a defendant, namely, a trial by a jury of his peers, and I consider that to mean either that a trial by a jury of his peers that he is reasonably satisfied with, and that means a jury that is physically and mentally, reasonably able to carry on.

Mr. Maguire: Have you talked to him, Judge?

The Court: No, I haven't.

But now there was something else you wanted to talk with me about.

Mr. Maguire: Yes, there is, your Honor.

Mr. Garrity: In the lobby.

Mr. Maguire: This is a matter of considerable [40] importance, Judge.

The Court: Well, I don't like to take up things in the lobby. You get in there and you say why can't you take it up in here.

Mr. Maguire: If you would rely on our discretion, we think it would be better in the lobby.

Mr. Garrity: This has nothing to do with the case.

Mr. Maguire: Well, it does.

Mr. Garrity: It's extremely personal.

Mr. Maguire: Extremely important.

The Court: Personal to whom?

Mr. Garrity: To me.

The Court: What?

Mr. Garrity: Personal to me.

The Court: Why aren't you all right?

Mr. Garrity: I would like to see you in the lobby.

Mr. Maguire: It is a matter of great importance.

The Court: Do you want to come in, Mr. Koen?

Mr. Maguire: We definitely want him.

Mr. Koen: I have no objection. As a matter of fact, I have no objection if you go in there alone.

The Court: Oh, no.

Mr. Maguire: Oh, no.

The Court: No, no.

Mr. Maguire: It isn't that at all. We definitely [41] want Mr. Koen present.]

The Court: [To the bar.] I want to express the opinion of the Court. I have an evidential question to take up which I think, in the light of all the circumstances, it is better to take up in the absence of the jury. Now I want the jury that are sitting in this case to understand that—

The Clerk: They are upstairs, your Honor.

The Court: Oh, they are upstairs? All right. We'll go in the other room. Keep them up there. Are you sure they are?

The Clerk: Oh, yes. I sent them up myself.

The Court: All right.

I want to say to the other members of the jury that once in a while as we go along in the trial of cases, frequently

on matters that involve the admissibility of evidence—take the ordinary civil case, any case—I like to have counsel come to the bench and talk to me, and in doing that then I am in a better position to rule on the admissibility of the evidence, because obviously you wouldn't have much of a decent administration of the law if you didn't have a formula by which you could discipline a judge. A judge needs to be disciplined just as much as anybody else. We all do. And, obviously, I bring counsel up to the bench. Sometimes I may forget it, but I certainly make it perfectly clear that the way to try cases is to try cases along an avenue of procedure which separates a jury [42] from all forms of prejudice and bias.

As you know, there are rules of evidence that govern the trial of cases. If you didn't have rules of evidence, why, you would have a rule of might governing trial. And there is an obligation on the part of the judge to observe these rules and the principles of law. And therefore, both counsel have a right to make an offer of proof in connection with some matter. So frequently during the course of the trial you will hear counsel ask a question and then there will be objection, and I will ask counsel to come up to the bench, and it is only done for the specific purpose of protecting the rights of the parties and saving the jury from getting into an avenue of thought that would cause prejudice, and, obviously, everyone that walks the streets that is worth his or her salt has an opinion. What we have to do is to submerge that opinion and consider ourselves sort of a legal formula, the preservation of which means so much to the continuous freedom that our form of society gives us.

Now I will go into the lobby with counsel.

[Recess from 10:45 to 11:45 a.m.]

The Court: I want it noted that there are some evidential difficulties in connection with this case, which is not unusual because it develops in many, many other cases,

and I want it understood so the press will know clearly and succinctly that that has been the only discussion, and it is a proper discussion. The Government has the right to ask for a [43] discussion of an issue, an evidential issue, and so has counsel for a defendant, and these questions are questions that have not bee .esolved. I thought counsel could resolve them.

Now, Mr. Maguire, you have asked for a—you have indicated you want time in which to examine some authorities?

Mr. Maguire: To request—

The Court: I don't want to deprive any person of his rights to a trial, and I will give you until tomorrow morning at 10:00 o'clock.

Mr. Maguire: May it appear in the record, if your Honor please,—

The Court: That's right.

Mr. Maguire: —that I requested ten days' continuance?

The Court: Well, I'm not going to give ten days.

Mr. Maguire: May I point out—

The Court: No, no.

Mr. Maguire: —that the matters we discussed went beyond the bill of particulars,—

The Court: I know that but—

Mr. Maguire: —and we are going to be prejudiced otherwise if we are forced to go ahead tomorrow morning.

The Court: I know that, but the difficulty is your asking me to interpret the legal meaning of a bill of particulars your way, and I'm not interpreting it your way, and you may be right, but if I am wrong there is a place where that can be cured, and it can be cured in the Circuit Court of Appeals. You [44] have a perfect right to ask for more particulars, but I want you to remember that I assigned this case around November 9—wasn't it—or February?

Mr. Koen. February 27th it was assigned.

The Court: February 27th, to go on trial April 2d;

and, as I said yesterday, I thought April 2d was Tuesday, and when I found it wasn't, I decided I would still go on with the case in spite of my heavy calendar which I couldn't escape because I started in as the emergency Judge yesterday morning, and I had to pick up matters that other judges have picked up, and it wouldn't have been right to have asked them to take over my work. I don't think it is right to ask a judge to take over work which he has just finished, and that's exactly what Judge Wyzanski had all last month, and I have had them, and the other judges have had them—we never know what is coming up. I never know what is coming in from one end of the day to the other. So that you had time, and I am not commenting on it at all, but I will continue this case until tomorrow morning at 10:00 o'clock so as to settle these evidential questions. I will give you that time. I will admit they are novel questions, I will admit that you ought to have a little time, and by the same token the Government is entitled to have time, and I think the Government would like that time—wouldn't you?

Mr. Koen: We shall try to have a brief ready.

The Court: You would like to have that time? Don't you think it's the right thing to do?

[45] Mr. Koen: Yes, I think we can have a brief ready tomorrow morning.

The Court: I want to be fair with everybody. They are simple questions. I have not indicated to you how they are to be resolved. And I want the press to know now, and I have to be very careful—I have a trial going on here, and I have a great deal of affection for the press, and I recognize the efficacy of the First Amendment to the Constitution and the necessity of having the public know what takes place. My difficulty sometimes is that I know the public doesn't get all the information that takes place—but that is not my business. On the whole I recognize that,

and I want to avoid anything which would constitute a basis for prejudice. I know the United States Attorney shares my position, and I am certain that counsel for defendant also share my position, namely, that everyone wants every person, whether it involves reciprocal rights in a civil case or a charge involving a violation of a statute which carries with it penal sanctions or whether it is a criminal case—everyone wants their party, their person, to have his day in court.

As I said yesterday, there is a personage here that is entitled to consideration, and that's the very important personage called the Sovereignty of the United States. There is a very important person charged with the violation of a penal statute, and that is the defendant. And this is a question of [46] law that has come up. I am saying this because I want counsel to understand that's where it is, and it's better to resolve these questions as I indicated before I went out, without knowing what it was; the way to resolve these questions is to resolve them in a manner which will do harm to nobody—reasonably. I felt you ought to be able to do it by quarter-past two this afternoon.

Mr. Maguire: If your Honor please, may the defendant state—

The Court: The United States Attorney's office—you feel you would like until tomorrow morning?

Mr. Koen: That is right, sir.

The Court: All right, I think tomorrow morning is time enough, Mr. Maguire.

Mr. Maguire: If your Honor please, may I say the United States Attorney—

The Court: Now you can prepare any other motion, you know, that you feel you need. Please! I beg of you! I am doing nothing to interfere with the obligation that's yours, and I know that no member of the jury would feel that you were failing to do your duty. So you prepare anything

that you feel is necessary. I will give it consideration. I will ask the jury to come in at 11 o'clock tomorrow morning, and I'll be ready to hear them at 10 in the lobby.

Mr. Maguire: May I again state, your Honor, that [47] overnight is not sufficient time,—

The Court: Well, I think it is.

Mr. Maguire: —bearing in mind the matters brought up are outside the bill of particulars.

The Court: I think it is because, as a matter of fact, the case has been assigned for a long, long while, and I have to reach a point where I have to fish or cut bait, and I have this jury impaneled, and I think it is a very, very wise thing to have these questions reasonably resolved if they can be reasonably resolved, and I am going to give you time reasonably to resolve them. It's efficacious to do that. Better to do that now than it is to proceed on the theory that haste makes waste. And I think the jury may come in at 11 o'clock tomorrow morning. I know these questions are important questions, that I intend to have Mr. Hurley do some research work this afternoon on it. My mind is wide open on those questions of law. I will be ready tomorrow morning to discuss them free from any suggestion of prejudice. That's the way I want it done.

None of the jury are here in court. This statement I am making because I don't want to have anything appear in the paper except that which is the truth, and the statement I have made is substantially true, isn't it—what we have been discussing?

Isn't that right?

[48] Mr. Maguire: That is right, your Honor.

Mr. Koen: That is correct, your Honor.

The Court: We are discussing nothing else but that. That is important for everyone to know—the rights and privileges of the defendant and the corresponding rights and privileges of the Sovereignty of the United States.

Bring the jury down now.

[49] [The jury arrive.]

The Court: Now, Mr. Foreman and Ladies and Gentlemen of the Jury, as you go along—and I want to say to counsel, now, if I haven't covered this situation clearly I want counsel to come up to the bench and speak to me and I will be happy to add whatever counsel feel I should say. I am sure that counsel will be in unanimity on it, as they have been, reasonably.

It is very, very important in cases, and the principle is the same whether it involves the reciprocal rights of parties in a contract situation and a tort situation and in the other cases that come before this Court, certain types of admiralty cases—there are a number of cases that carry with them the right on the part of a person, whether he is seeking relief civilly or whether he is under indictment, and I have explained to you carefully what that is.

Please remember, now, that's—I made it clear this morning and I want to repeat it again because you were not down here—the institution of a grand jury is one of the oldest institutions in the world. It goes back for about 1,000 years. It is a recognized formula under the aegis of which 23 fine citizens gather together and, behind closed doors, they listen to testimony. One of the purposes of that is to see to it that no charge is made against any citizen unless it is received under the sanctity of an oath and under circumstances [50] where a body of men and women find themselves in a position to say—remember, now, a defendant is never represented before one of these bodies. Under the statutes of the United States a grand jury can sit here for 18 months; we have approximately four terms a year, however, in which we bring in others. It has not been infrequent to have three juries sitting here at the same time. There is a special grand jury sitting on some matters which have been under investigation and I think there is one that was

organized and instructed by me. I don't know whether they have finished their duties or not but it might well be if they haven't, they will require an extension of time.

But those are matters which are peculiarly within the province of a grand jury and it is a situation where, if a person wants to appear, he appears at the pleasure of the foreman and members of the grand jury, if they desire to hear from him. And then it requires a majority vote and then a formal charge is issued.

Now, you take that system and you apply the system which expediency and simple justice calls for, and that is—for example, a person is speeding, he is stopped by an officer. The officer appears before a clerk of a district court and that clerk of the district court is the one that hears the officer on the issues, what they call a complaint, a summons upon a complaint. Someone decides that they want to have someone prosecuted for assault and battery, they proceed the same way, [51] but on certain types of crimes, felonies, particularly, they have to be presented to a grand jury so it is only a formal charge. It does not carry with it the implication that a person is guilty.

Then after that is returned there are certain formulas which are set out in the Rules of Criminal Procedure, and these Rules of Criminal Procedure represent a reaffirmation of some of these principles that have been in operation for many, many years, so that a person is able, properly, under the laws of the United States, to have an opportunity for preparation. As a matter of fact, the Constitution of the United States guarantees it.

Now, during a trial—I speak of this because it is correlated with the situation here—during a trial counsel has the right to ask questions. There is a corresponding right on counsel for the defendant in a civil case, or vice versa, to object. There is an obligation on the part of the Court, courteously at all times, to receive that objection. That

same rule of chalk applies to the trial of cases involving violations of the statutes of the United States because that is all we deal with. And the better practice, if it is important, is for lawyers to come up to the bench. I like to have them do that, discuss matters in the absence of the jury. It isn't done for the specific purpose of closing the door to the jury, it is done for the purpose of trying to protect both sides because it isn't [52] what you think is the proper way, it isn't what I think, it is what the laws of evidence are that regulate and control the trial of all causes.

Now, I empaneled a jury this morning in another case and when I did there was a request by counsel that a conference be had. I made it clear in open court before you came down. It was a conference involving some evidential factors. They are evidential factors that are important to the defendant and they are important to the Sovereignty of the United States.

Counsel for the defendant has asked for a longer time. In the exercise of my judicial discretion I have denied it and I understand his rights have been saved. I have given the reason; there is no need of repeating it. Counsel had a right to ask for that. No inference is to be drawn from his request or from my refusal to grant it, but I feel in deference to the rights of all parties that these questions are better resolved, if they can be resolved, by understanding as to what the law is. Probably it may accomplish nothing, but it is worth trying.

I, therefore, have given counsel until 10 o'clock tomorrow morning, counsel for the United States Attorney representing the sovereignty of the United States, and Mr. Maguire and Mr. Garrity, representing this defendant. At 10 o'clock I will hear the merits of these questions. I have to pass upon them outside the jury. If I ever pass upon these questions in the presence of a jury, I would be clearly guilty of reversible error. [53] It certainly would be a

gross interference with the rights of the parties, on one side the sovereignty of the United States, of which you are a part, and on the other side a human being who is a citizen of the United States who is charged with the violation of a penal statute.

So I am going to excuse you until 11 o'clock tomorrow morning. If there is anything else that counsel would care to have me say, I would be happy to say it.

May I ask counsel if what I have said—you, Mr. Koen, and to you, Mr. Maguire, if that substantially satisfies, in substance, what your memory of the situation is. Does it?

Mr. Koen: I am satisfied, sir.

Mr. Maguire: It is all right, your Honor.

The Court: You are both satisfied, so I am going to excuse you until 11 o'clock tomorrow morning because I think counsel is entitled to have this afternoon, and I want to do a little bit of work on it myself, so I am going to let you get away early and, God willing, I will see you tomorrow morning at 11.

Will counsel come up? I want to see No. 11 juror, Mr. Zuckerman.

[Conference at the bench:

The Court: Mr. Zuckerman, the Deputy Marshal reported to me that you had difficulty hearing.

Juror Zuckerman: That's right.

[54] The Court: And that you would like to be moved into the first row instead of the second row, where you are sitting.

Now, you are essentially the master of your own physical condition. I think you are a very, very fine citizen. I have a cross section of the population of this Commonwealth, and you exemplify one part of that cross section. I have you on this jury not because I tried to get that, but the difficulty with the situation is this, that the defendant in a civil or criminal case is

entitled to have a trial—the government and the defendant are entitled to have a trial under circumstances where each and every member of the jury can feel that each and every member of the jury can hear the testimony. Do you think you can hear it all right?

Juror Zuckerman: I will explain. Because I am a juryman I want to get every detail and I want to be fair and I don't want to miss anything. Therefore I figure if I could sit nearer I could hear better.

The Court: Can you hear all right?

Juror Zuckerman: Oh, yes.

The Court: That's all right. We can have you moved in there.

Juror Zuckerman: Nearer to the witness chair.

The Court: Any chair except the foreman's chair.

[55] Mr. Maguire: No. 2, your Honor.

The Court: I will put you in No. 2. You feel you can hear all right?

Juror Zuckerman: Yes. Sometimes they talk low—.

The Court: May it be noted, Mr. Maguire, that the United States Attorney and counsel for the defendant agree that this juror is perfectly capable of hearing, and the only thing he feels, he wants to be certain he will hear everything and he says he can. You don't have much trouble?

Juror Zuckerman: No, I have not. The only thing, sometimes they speak low, I can't catch on very well so I would like to be nearer to hear everything.

The Court: If a juror doesn't understand, all the juror has to do is to ask the witness to repeat it. We will be glad to have any witness repeat any question that any juror wants to hear.

Juror Zuckerman. I can hear well all the time but sometimes if they speak low—that is the first time in

40 years I am in a court room. It is worth while to have experience like that.]

I am going to see Mr. Julian on an entirely different matter; it has nothing to do with this case, and you have my assurance I will talk about nothing concerning this case.

[Adjournment to 10 a.m. Wednesday, April 4, 1956.]

[56] THIRD DAY

Court Room No. 5,
Federal Building, Boston,
April 4, 1956.

[Not in the presence of the jury.]

The Court: Are you desirous of arguing these motions in the court room or are you desirous of arguing these motions in the lobby?

Mr. Maguire: If your Honor please, I think by nature they would almost have to be in the lobby.

The Court: What does the United States Attorney say?

Mr. Koen: I have no objection to that, sir, but when you speak of motions I presume you mean the matters which were discussed at the bench yesterday—

The Court: On the matters in connection with the substance of your opening. That is all we are going to pass upon now.

Mr. Maguire: I understand, if your Honor please.

The Court: I would like to have counsel come up. I personally do not like to have—I have to have a voir dire examination but I don't like to close the court room doors in these cases.

[Conference at the bench:

The Court: It is inescapably clear, gentlemen, that it is my obligation to refrain from saying anything or doing anything which would indicate [57] partisanship in the trial of a case, whether it is civil or criminal. Now, written into the customs and practices of

the trial of cases is the very efficacious procedure by which an opening is made. An opening is not evidence. An opening is a statement of what the moving party—and the moving party here is the government, we will all agree on that—what the government expects to offer as evidence, on the basis of which a jury, as a matter of law, could properly proceed to weigh.

My suggestion is this: I am not going into the question of authority of Mr. Garrity at the present time—I don't think I should—to make a statement, but I was going to suggest to you, Mr. Koen and you, Mr. Di Mento, that the character of the opening could be such that the name of any person outside of the defendant, not being referred to as Mr. A or Mr. B, because that would attract attention, could be made factually, with no mention of his name. Then the method of showing authority is a matter for the United States Attorney.

For example, you have regulations promulgated by the departments, which is done under a provision of a statute of the United States and on which the Court would have to take, or could take judicial notice. [58] There shouldn't be any disagreement on it. There are rules and regulations promulgated by the Commissioner of Narcotics and the Director of the FBI and the Internal Revenue Commissioner or the Secretary of the Treasury, under the terms of which provisions are made, for example, in the Treasury Department—I am not going to begin to enumerate all the divisions, but certainly one of the divisions is the division which has to do with the detection, arrest, trial and punishment of those who violate the provisions of the Internal Revenue statute, bearing upon what we might properly describe as tax evasion.

It is also clear that no lawyer can practice before,

on the civil side or the criminal side, as I understand it, unless they have the authorization, just as they can't practice, for example, before the Securities and Exchange Commission and the Interstate Commerce Commission and the Federal Communications Commission, and in order to do that the authorization is expressed in some form. I am not prepared to say what it is. But I speak of this only as bearing upon the method of approach which I would have to make now and which becomes a matter of evidence later on, and I must meet it that way.

In addition to that, when you get into the [59] criminal division, which is more properly referred to as a division that has to do with this investigation, when you get into a division where they have what they call hearing officers or legal advisers, that pass upon, ultimately, the question as to whether or not there should be a recommendation of criminal prosecution, and I don't think anyone will disagree with me when I say that is the step, and before that step is taken I assume I am going to meet a situation that has been met in other courts with never any objection.

You have lawyers that come before a legal officer impressed with the power of attorney to speak. I am not passing upon the question as to whether or not that represents sufficient authority to—I do not mean to use the word "waiver"—sufficient authority on the part of the attorney to speak up for his client and whether or not, that being so, not in the nature of a waiver but in the nature of authority to speak as the agent of the taxpayer, to go into that I am going to be on this for three or four days on an evidential question that will cause unnecessary delay.

For example, you take these cases, these net worth cases that have been passed upon. No matter how you

read those cases, in all those cases if a jury [60] believe that the monies that came into the possession of the taxpayer, whether they came through corrupt channels or through honest channels, because after all this defendant isn't being tried for his honesty or dishonesty in Worcester, he is being tried in this court only within the four corners of that indictment—you know what it is and I know what it is. For example, Mr. Koen, suppose this case reached the point of going to the jury and suppose, for example, that a statement is made by Mr. Maguire or by Mr. Garrity or by Mr. Jones or Mr. Brown, with that authority to speak for him, "This is what my client says. These monies that you say now are the basis upon which you are predicating the claim of the government of a violation of a statute which carries with it penal sanctions are sums of money that came into his possession either by gifts or by bribe." I would have to tell the jury if they believe that, and if it was outside the statute, that it would be the duty of the jury to find the defendant not guilty. Do you not agree with me?

Mr. Koen: No, your Honor, I do not.

Mr. Maguire: May I say it would be entirely prejudicial if that ever came in.

The Court: Why do you not agree with me?

[61] Mr. Koen: You haven't told me at what posture of the case—

The Court: I am assuming they were able to say it came from that. I have in mind the other elements that go to make up a net worth case but I am assuming that money came back in the days before the statute—

Mr. Koen: Well, there are several aspects of that situation, sir, and I think they are far off the point we started to discuss here, which I think we can

develop. I think there will be evidence to show that this man, by his own statements to the agents in the presence of his attorneys, stated that he received monies in the form of gifts and bribes because he was a member of the police force.

Mr. Maguire: Do I understand that that is the testimony?

The Court: I don't want to go—

Mr. Maguire: He purported to read to us yesterday what this was going to be and this is quite different from the way we took it down yesterday in the lobby, your Honor.

The Court: So as to free my mind from any suggestion, prejudice, bias or anything which would indicate from the point of view that would be hostile towards the government or towards your client, I [62] carefully refrained—I walked out—I haven't the slightest desire to know what that is. I will meet it as we go along.

[63] Mr. Maguire: As I see it, in terms of what you have talked about this morning, before you start—

The Court: I am not going to settle openings. If I settled openings on the question of objection, we would never get started.

Mr. Maguire: On the opening of Mr. Koen, what he said yesterday—

The Court: I suggest he names nobody.

Mr. Maguire: Whether he names the fellow or not, it is obvious who it is, aside from that, it is highly prejudicial.

The Court: Is it your position if a person had authority to speak and appeared, as I say he has to appear, he has to have a card to practice?

Mr. Maguire: We can satisfy you, we believe, your Honor, he does not have authority.

The Court: Listen.

Mr. Koen: Do you deny he filed a power of attorney?

Mr. Maguire: I want to get into all that. I do not know whether you folks have the power. We want your Honor to see—

Mr. Koen: Are you going to argue he did not have?

Mr. Maguire: The exact terms of the power.

The Court: The terms of the power are all right, [64] as a matter of fact, isn't it a fact when you get a card—let me ask you this, let's get this into the record, you are the one, so there will be no misunderstanding, the objection is to the case of your associate, Mr. Garrity, who appeared allegedly before some representative who is alleged to have appeared, and so forth, before some representative of the Treasury Department and to have made a statement. Wait a minute now. It was a statement which involved this defendant. He made it without the authority of the defendant himself. Now that is your position.

Mr. Maguire: I think, if your Honor please—

The Court: You ought to know the circumstances. I don't want to know them.

Mr. Maguire: If your Honor please, I have to insist.

The Court: No, I am not going to do that.

Mr. Maguire: Your Honor, you can not possibly rule on it.

The Court: If I did that, I would never get a trial. You would be taking each step of a trial in a criminal and civil case, I would be ruling on it at a time when it wasn't given under the sanctity of an oath.

I am not going to listen to one side or the other [65] on that.

Mr. Maguire: Please.

The Court: Did you have a card, Mr. Garrity?

Mr. Garrity: I think I must have, I assume I must have. I have been there many years.

The Court: You know you could not practice law before the Treasury Department unless you have a card.

Mr. Garrity: Let me correct you, that card went into effect, after I first started practicing up there. The dates, I do not know.

The Court: You had to get the authority?

Mr. Garrity: I have one today.

The Court: You had to be admitted to the practice of law in the Treasury Department court, before you can practice.

Mr. Garrity: I believe it was true in 1951. I know it is true today. I know I have had it since it went into effect.

The Court: This alleged conversation, if it did take place, took place after 1951, didn't it?

Mr. Garrity: In 1951 and 1952, I believe.

The Court: So at that time you had a card?

Mr. Garrity: I do not know but I think I did.

The Court: I am not going to rule on questions of evidence, except when they come up. If I had to rule [66] on every question of evidence in the trial of the ordinary contract or tort case, I would be ruling without having any evidence before me.

Mr. Maguire: Your Honor, if the opening is made, as Mr. Koen intended to make it yesterday, it is the defendant's position it would have been grounds for mistrial immediately.

Mr. Koen: I can not think of anybody in this court room who knows what I was going to say, outside of myself.

The Court: You know I don't.

Mr. Maguire: You stated in the lobby yesterday you intended to get into the evidentiary matters we have been discussing.

Mr. Koen: Evidentiary, yes. The trouble is we started off yesterday. I never said yet what I was going to say in my opening. Then we got into the discussions at the Judge's suggestion of what these factual matters were.

The Court: I walked out.

Mr. Koen: I was kind enough to tell you briefly what the factual and evidentiary setup would be.

The Court: Is it your position—

Mr. Koen: May I get this on the record? I have yet to make any statement to anybody as to what [67] the contents of my opening is, with the exception of Mr. Di Mento, an associate of mine.

Mr. Maguire: If I may, please, in answer to that, in the lobby yesterday, it is clear to the defendant, Mr. Koen in his opening was going to go into this matter.

Mr. Koen: The opening is one thing. The discretion of counsel would be something else.

The Court: Suppose that I am a prosecutor. I have before me, I have a case where Mr. A is being prosecuted for passing government checks, stealing government checks. Do you mean to say that—

Mr. Maguire: Would you adjourn—

The Court: No, I will settle it up here. Do you mean to tell me I would not have the right to give the jury a word picture of what the government expects to prove? Of course I would. Now you don't mean to contend, do you, that if the government—I am not passing on it—if the government has evidence, admissible evidence, without mentioning any names which

shows—wait a minute—that in explanation for the spending of some sum of money, X dollars, that the man, either through himself or through someone authorized to speak for him said, I got this money—wait a minute—

[68] Mr. Maguire: You are presupposing it is admissible. We say it isn't.

The Court: Yes, I am going to admit it.

Mr. Maguire: If your Honor please, I am going to move now for a mistrial, if your Honor please, in view of that statement. I just don't think—

The Court: I am going to admit that evidence, unless—

Mr. Maguire: You can show me some authority, I want to go into it, if you deny it, I will make an offer of proof. I would like to move, on my motion for mistrial now.

The Court: I am not going to listen to an offer of proof, until evidence is—

Mr. Maguire: You stated you would admit that evidence. I move mistrial, your Honor please.

The Court: No.

Mr. Maguire: I would like you to rule on that.

The Court: I am not going to do it.

Mr. Koen: I thought the Court said—

Mr. Maguire: He made the statement after I moved for mistrial. Your Honor please, I want to make an offer of proof.

The Court: I prefer to have you mention nobody's name. Will you do that, in your opening?

[69] Mr. Koen: That is the first time the question has been asked of me. I may tell you this, the verbiage I will use in my opening will be that there were admissions by the defendant which we will introduce

in evidence and evidence from other sources, that is the way I am going to describe it.

The Court: I will allow that opening. We will go ahead.

Mr. Maguire: I would like to make an offer of proof.

The Court: I am not going to take any offer of proof. Now there has been no evidence offered.

Mr. Maguire: First let me offer a motion to suppress. In terms of this motion, if you deny this, the opportunity to be heard—

The Court: I won't. I will reserve on it and pass upon it when the time comes.

Mr. Maguire: May the record show we were denied an opportunity?

The Court: No, the record will show I am accepting this. It is filed by the Clerk. When the time comes I will hear it.

Mr. Maguire: The defendant would like to make an offer of proof at this time.

The Court: Listen, Mr. Maguire, as I have no evidence offered before me—

[70] Mr. Maguire: We will offer evidence on the motion.

The Court: If I have no evidence offered before me now, how can I pass upon it? I will let you pass upon the motion, before the evidence is offered. I can not do it now.

Mr. Maguire: If your Honor please, I would like my exception to the denial to my offer of proof now.

The Court: I am going to permit you to object to it and offer evidence at the time, when you offer the evidence, when it would arise. The jury is here, they may come down. If they are not here I will wait until 11 o'clock. (End of Bench Conference.)

(Jurors not in court room.)

The Court: If counsel have any briefs prepared I would be happy to receive them.

Mr. Maguire: Unless you allow the defendant to put on evidence—

The Court: I want no discussion in this court room from the United States Attorney or yourself. I have made this ruling. I am doing it out of deference to the rights of your client. I am doing it out of deference to the rights of the sovereignty of the United States. That is the way it is going to be tried. [71] I want to say to counsel for the government and counsel for the defendant that now it is the right of either to object at any time, I want it understood,—just a minute, keep the jury out—I want it understood under no consideration is there to be any statement to be made in the presence of the jury. I am doing that so that the rights of no party will be unprotected, in so far as I can possibly do it. Evidence will be kept out, which in any way interferes with the precious rights of this defendant, which I intend to protect and the rights of the United States Government so that we can have a kind of trial that you are entitled to under our free society. That is all I want to do and nothing else. So that I have made it clear, as the evidence comes along, Mr. Maguire, you have the right to object. I have not ruled on your motion. I am not going to rule on something that is not before me evidentially.

Mr. Maguire: Will your Honor hear me at the bench on another matter?

The Court: Certainly, come up.

[Conference at the bench, as follows:

Mr. Maguire: If your Honor please, in this morning's paper, the Boston Globe, Wednesday, April 4,

1956, there is an article which I want to introduce [72] in evidence, which states that Mr. Iaconi is being sought as a witness in Lieutenant Massei's trial. The article refers to Mr. Iaconi as the former Worcester gambling czar and they refer to Lieutenant Massei as formerly head of the Vice Squad in Worcester.

I am informed, if your Honor please, that on the WNAC news cast this morning at 7:15 there was a similar story related on the air.

I think in terms of that, particularly where, as far as I know, Mr. Iaconi has no evidence whatsoever that will be admissible in this case, I think that is highly prejudicial and move for a mistrial.

If one of the jurors read that article, I don't see how he could help but be prejudiced against my client.

The Court: I appreciate your position thoroughly. The difficulty is, one of the inescapable circumstances of our free society, is the fundamental right of newspapers to write up articles. Were I to become a censor to those newspapers, I do not know where I would be. I agree—

Mr. Maguire: I appreciate—

The Court: It is better unsaid, but you cannot blame the United States Attorney for that.

Mr. Maguire: I don't, if your Honor please.

[73] The Court: I have suffered, there is no one suffered more from vicious headlines in the papers, more than I have.

Mr. Garrity: Will your Honor let us confer for one minute?

The Court: I haven't lost sight of that for one minute. We all do.

(A short pause. Mr. Garrity and Mr. Maguire confer.)

The Court: I would like to make it part of the

record one of my associates suffered from these headlines that have appeared in the newspapers, in another court. Judges will get it and so will United States Attorneys.

Mr. Koen: Wait a minute, I haven't seen it.

Mr. Maguire: I know you haven't.

The Court: You are not responsible.

Mr. Maguire: I state, if your Honor please, if a juror saw that article appearing in the morning paper, in addition to the news cast, my client can not get a fair trial and I ask for a mistrial.

The Court: I want to say this to you, as far as this Court is concerned—

Mr. Maguire: Your Honor,—

The Court: This Court will carefully, very [74] zealously and studiously safeguard the rights of your client.

Mr. Maguire: I am not sure of that, your Honor.

The Court: And do everything in its power to get a fair trial. I can not jump the gun and say he hasn't. If I ever determine that either through a mistake of my own—and I have set a verdict aside because of my own mistake—I won't hesitate to do it, if I ever felt that justice wasn't being served, through some dereliction on my part.

I am part of the natural order. I can make mistakes. If a defendant's rights were violated by a series of circumstances which caused blind prejudice, I would not hesitate to take care of it.

If during the trial something inflammatory took place of such a nature as to make it inescapably clear a man could not get a fair trial, I would not hesitate to declare mistrial. I can not jump the gun. I can not regulate the newspapers. What is the use of scolding them?

Mr. Maguire: I appreciate the problem. I look at it only from the point of view of the defendant. In view of Mr. Iaconi's reputation—

The Court: I suggest you read the article into the record now.

[75] Mr. Koen: May I make a statement, when that has been done?

The Court: Surely.

Mr. Maguire: I would like to introduce the paper itself, if your Honor please.

The Court: All right. With the article which appears on page 24.

[76] The Court: You may mark this as an exhibit, the newspaper itself. This is the Boston Morning Globe, and on a motion by counsel for the defendant that because of the publication of this article, with the reasonable probability that it could be read by any juror, that that would be of such a nature to make it impossible for him to get the kind of trial our founding fathers intended a man should have, a trial by 12 citizens free from bias and prejudice.

(Boston Morning Globe for April 4, 1956 marked Defendant's Exhibit A.)

The Court: Mr. Koen, did you want to say something on it?

Mr. Koen: Yes, sir, if I may.

The Court: I wanted it to appear also I don't want to have counsel hesitate for one minute to come up to this bench on any detail and to not feel I will attach any nuisance value to that. I will not. I made it clear to the jury yesterday it is the proper way to do it and I want you to feel it is your right to come up here. It is the right of counsel for the United States Attorney to come up and talk, too.

Mr. Koen: I would like to make this statement for

the record, may it please the Court, that two subpoenaes have been issued for Mr. Iaconi, one to be served at his home in Worcester and one to be served [77] where he is presently located, as I understand, in Florida. The purpose, seemingly the Supreme Court has said, in the Holland case, is that there is an obligation on the government to exhaust every lead reasonably susceptible of proof. The information which we have in our files indicates that this man received money from gambling interests. It is common knowledge to the Treasury officials that Mr. Iaconi was involved in gambling activity during the indictment period.

We want him here to find out and to exhaust that lead, and that is the only purpose for which we want him. It may very well be when he comes up here it will be negative and I will not use him, but I certainly will use him if his answer is in the affirmative, in any way.

Mr. Maguire: Do I understand this is further investigation by the government at this late date?

Mr. Koen: Of course it is not. I have a right to issue summonses—

Mr. Maguire: May it also appear in the record that Mr. Koen and Mr. Pastore journeyed to Danbury in May of 1955—

Mr. Koen: It is already in the record. I admitted that in june.

Mr. Maguire: Let's put it—

[78] The Court: I will let you put it in again.

Mr. Maguire: —to question Mr. Iaconi who was then confined there in connection with this case particularly—

The Court: He wasn't confined in connection with this case; he was confined after having pleaded guilty and receiving a sentence.

Mr. Maguire: He was questioned as to the source of this present defendant's income and Mr. Koen and Mr. Pastore were told at that time that he, Mr. Iaconi, had no information on that score whatsoever.

Mr. Koen: Of course I object to that last statement.

The Court: Well, he says that. You say that isn't so?

Mr. Koen: That isn't quite correct.

The Court: All right. I want to have it made clear, wherever this information came from, the newspapers have a right to publish reasonably news that they get and it was quite clear that subpoenaes were issued. And I have tremendous confidence in the integrity and the forthrightness of the United States Marshal. He is a very, very fine young man and I have known him and he has got a fine office force and I would like to have you, Mr. Reavey, tell Marshal Boudreau from now [79] on, on all subpoenaes in connection with this case there is to be a cloak of secrecy. The names are to be put in a special book, available to no one but those that are in the United States Attorney's office, whether those subpoenaes come from the government or whether they come from the defendant, to be served. That will eliminate, I think, Mr. Koen, the question of publication of anything in these claims.

Mr. Koen: My difficulty is that I never talk to the press.

The Court: That's right. That is their business.

Mr. Koen: If that is their job and they do it well—

The Court: Over the years I have found the newspapermen to be very, very wonderful fellows. They have had to write up articles that made me feel—but they did it, and it doesn't do a person any harm to

be disciplined. It didn't do me any harm. Being put in a position where once in a while you have got to realize you are just an ordinary fellow that can make mistakes makes a person a little bit more humble, and that is what the courts are for. If a judge makes a mistake, the judge may sit down and say they are wrong because the judge that sits knows more than the judge that reviews. What the reviewing courts ought to do is [80] keep away from facts, but in the overall picture I wouldn't do away with it for the world. I am not a bit sensitive about it. I expect lawyers to go before the Circuit Court of Appeals and I expect them to be very rugged and tough but I don't expect them to front for others, and this isn't with reference to this case. I don't expect them to front for Mr. X and Mr. Y and Mr. Z, who is paying the bill and who properly should be before the court. I will have some comment to make on that later on.

A lawyer who goes to the Circuit Court of Appeals and proceeds to tear me apart and gets his money from that source, he is not going to get away with it. That isn't this case. This is all right. These are fine lawyers. I am very proud of you lawyers, you know that. I am very proud of you, Mr. Maguire, and I am very proud of Mr. Garrity and, after all, the two of you, I thought enough of you to pick you up in swaddling clothes and try to make good lawyers out of you, and then of course Mr. Koen, who was my administrative assistant when I was United States Attorney, and it didn't do him any good from the salary point of view but he was that, nevertheless, and I have a great deal of fondness for him. That is, I have very pleasant memories of my associations with you young men and you [81] are here doing a job and I applaud you for doing it and that is what we should have. We

ought to have that kind of a trial. A judge hasn't any right to feel he can't make mistakes. I can make plenty of them but I don't want to do anyone any harm. I think I have taken care of your rights. I haven't ruled on your motion to suppress.

Mr. Maguire: I think my rights are protected on that; thank you.

The Court: On that motion to suppress, so that there will be no ifs, ands, or buts or anything published about it, I will order that impounded now so that it will only be on the theory it won't be published and I won't be getting a motion to have another mistrial. Do you follow me? I am not doing it to deprive the newspapermen of the chance to see it, because they will see it at the proper time. If counsel feels I shouldn't do that, I won't do it. How do you feel about it, Mr. Maguire?

Mr. Maguire: I think I would rather have it impounded.

The Court: All right, if you want to have it impounded, I will. You agree, don't you, Mr. Koen?

Mr. Koen: Oh, sure.

Mr. Maguire: One request—]

[82] The Court: I would like to say to the gentlemen of the newspapers wherever I order something impounded, I am not trying to keep information away from you because at the proper time the matter will become a subject of discussion in court. I am only doing it for the purpose of making certain we cross each bridge only when we reach it.

[Conference at the bench:

Mr. Maguire: If your Honor please, may I request that the defendant, during the trial, be permitted to sit where he is, on the front bench?

The Court: As a matter of fact, what I would like

to do is this: I think we—what do you mean, in the front row? I think it is very commendable for us not to have docks, but on the other hand I want the defendant left alone, not having anyone beside him.

Mr. Maguire: We expect possibly his wife—

The Court: I haven't the slightest objection. I think it would be better, Mr. Maguire, if he sat alone. His wife could sit in back.

Mr. Maguire: Sit on that front bench?

The Court: I don't want other men—

Mr. Maguire: I am sure the marshals can take care of that.

The Court: Better take care of it now. I can get him a comfortable chair in front—

[83] Mr. Maguire: We would rather have him there, your Honor.

The Court: All right. He is going to sit in the further corner, is he?

Mr. Maguire: Yes.

The Court: That's all right.

Mr. Koen: Mr. Maguire, maybe I shouldn't say this, but I am wondering whether or not counsel for the defendant—I missed some of his remarks—whether he asked to inquire of this jury whether the jury read these articles or haven't, or whether they have been influenced by them.

The Court: I am going to speak in general terms about articles in newspapers. If I asked the jury to read it—whatever counsel care to have me say to the jury, I will say.

Mr. Maguire: The defendant's point of view, if your Honor please, the only way—the harm has been done and the only way would be to go into the article.

Mr. Koen: You presume the harm has been done.

The Court: On the other hand, it is the duty of

the Court to see to it that no undue prejudice is in the minds of the jury, and if they flow adversely to the defendant, and I took great care to do that yesterday, I thought I did, and I understand that counsel for the [84] defendant has ordered a copy of what I said.

Mr. Maguire: That's correct, your Honor.

The Court: And I think you will find what I said is that, which is a great fortress of protection for the defendant.

Mr. Koen: Then it would appear to me, sir, if there is any merit in this defendant's motion for a mistrial because of these articles, this is the time to establish, once and for all, whether any influence has been exerted on the minds of the jury by these actions. If they haven't read them, it necessarily follows there has been no contamination of their minds.

Mr. Maguire: I suggest you can't find out whether they read it without referring to the articles.

The Court: I won't refer to the paper. I think I will refer to it in general terms and tell the jury to disregard or refrain from reading any articles about this trial. That is what I will do. Bring the jury down.]

[The jury arrive.]

The Court: I would like to say this to you, Mr. Foreman and Ladies and Gentlemen—will No. 11 on the jury be good enough to exchange seats with No. 2?

The Clerk: That is Mr. Howell and Mr. Zuckerman.

The Court: No. 11 is in a position where he feels that [85] he can hear better but you don't mind?

Juror No. 2: No, your Honor.

The Court: That is the only reason. He didn't request No. 2. I picked No. 2 only because I couldn't separate the distinguished foreman from his position and the nearest I

could get to the witness stand was to have him take your place as the No. 2. I couldn't dispossess the foreman.

Now, Mr. Foreman and Ladies and Gentlemen of the Jury, we are starting on a trial and I am compelled to make a statement to you. There isn't any person that has more respect for these fine representatives of the press than I have. Sometimes they have to publish articles that I would feel better that weren't published, but they have to do it because the public is entitled to know.

I have known several of them for many, many years. I have a deep appreciation and affection for all of them and for two of them in particular, because there was a very wonderful man here that was an institution in this building and frequently he would come into my court room in his later years when he had to continue to work because he couldn't afford to loaf, and his paper was wonderful—he would come in here and sit in a chair and fall sound asleep. I always said to the court officer, "Don't disturb him. He is getting a little comfort." And they carried him on their shoulders, figuratively speaking, and they would send him home, and then the good Lord took him. He was a [86] God-fearing man.

Now, under the First Amendment to the Constitution there is a freedom given the press. That freedom is a freedom which I am convinced that the newspapers try to exercise reasonably. On the other hand, these fine men are not here doing any shadow boxing, so to speak. They are here for the express purpose, no matter what case it is, to get information. The more important the case is, the more publicity there is.

As I look back over the—well, I think I would call it Memory's Golden Lane, because it goes back over many years—I have had a lot to do with the trial of cases, I was United States Attorney, I was head of the criminal division in the war-torn days when days were turned into

nights. I have seen myself coming out of this building at two o'clock in the morning. Together with others associated with me, we carried in our hearts many, many secrets, matters that never were given to the press, matters that affected the perpetuity of this country, sinkings of transports out here in Massachusetts Bay by German submarines, losses of lives, the necessity of having what they call a dimout program, the effect of shadows from the rays of gas or electricity, from houses that bordered on the Cape, for example, and the relationship of that, scientifically, with certain advantages that the enemy had. And those were only some of the many, many complex problems that I have seen. Yet, over those years, I came to realize [87] with considerable forbearance, with the pride of a fond memory, and with affectionate regard for those that have gone to their just reward, these fine men that covered this building for the various newspapers. I speak of this only because sometimes during the course of a trial matters are printed in the newspaper which might affect the rights of litigants. Sometimes they run to civil cases, sometimes they run to criminal cases.

Now, I speak of it only because from day to day the papers may or may not carry stories of this trial. They have a right to write stories of this trial; they have a right to inform the public from a narrative point of view.

[88] I know you will try to refrain from printing anything would be inflammatory, either here or in Cambridge or Somerville or Framingham or Worcester or Springfield or North Adams or New York or any other place, because one of the most sacred rights that I know of is the right to have a trial free from all prejudice and bias. It is the right to have a trial where a Judge presiding, regardless of what his private opinion is, of course he has it, everyone has it—where he will remember that he is one person against twelve citizens and where he refrains and

will do his best to refrain from saying anything which would cause prejudice.

I am very, very sincere in my efforts to bring that about. I try to cover it when I talk to you about your responsibilities and your duties. I told you that a court-room would be a three ring circus, it would be a burlesque on justice, it would be an American tragedy, it would be the end of our civilization, if we did not preserve the fundamental rights. When we try to preserve these fundamental rights we must have in mind our own inhibitions, our own reactions. For example, if I were to offer a suggestion to you, I would offer this suggestion, that no matter what article may appear in the newspapers from now on, in connection with this case, I suggest that you do not read the newspaper. If you have read anything up to the present moment, in these newspapers, which would have a tendency to create in your mind a state [89] of prejudice of such a nature that you could not separate that prejudice from your obligation to render a true verdict, if the evidence reaches that point, and all that means is, to speak the truth. It has a Latin derivative, two words, to speak the truth.

I want you to tell me any time you feel like it, then you will have a realization that you are conforming to the best standards of a glorious system of jurisprudence, not perfect by any means but representing the growth and development of a culture that is intertwined with the things in life that give us abodes of peace where men live and let live. This isn't any melodrama. The trial of these cases it is a simple formula, predicated upon common sense, certain rights which I will explain a little later, set aside for a defendant.

For example, it is the right of the United States Attorney, it is the custom and practice for him to tell you what he expects to prove. That is not evidence. That is a state-

ment made in good faith. It is predicated upon what he thinks comes within the orbit of the admissible evidence.

So that you receive it not as evidence but as a word picture of what he expects to prove. It is the corresponding right of counsel for the defendant to set forth what he expects to prove, all of which, when it is said and done, in any kind of case, civil or criminal, creates some premises upon which [90] to predicate your verdict, rejecting as I said to you that which you cannot accept, either in whole or in part.

When these rights and privileges which are so precious to a defendant, in the trial of a criminal case, covered by these amendments to the Constitution, covered by the Constitution itself, covered by the statutes of the United States, when you are satisfied then as citizens of the District of Massachusetts, coming here under oath to do your duty, that you pass upon the question as to whether or not there has been a violation of a penal statute. It is a simple thing. It does not mean, because these provisions are there, no one can be found guilty. Of course it does not. No man is obligated to take a witness stand in the trial of a criminal case. He has a right to remain mute. He has a right to pursue that during the whole course of the trial.

He has a right to leave the question of his guilt or innocence—I am not talking about this case, I am talking about any type of criminal case—he has a right to leave his guilt or innocence to be determined by a jury. It would be wrong for any jury to draw any inference against him because of the fact that he failed to testify, for the simple reason that we are a government of laws and the government is obligated to offer evidence in conformity with a certain tax, I am not going to speak of it now. It is a little bit different from the test in a civil case but it is a very simple formula, [91] there isn't anything hard about it. If we didn't have that, you would have no protection for a de-

fendant, you would have no protection for society either. There would be no way of protecting society against malefactors.

I make that as a general statement. That is the picture as a whole. I beg of you, refrain from reading anything in the newspapers. I would refrain from reading. They have a right to publish, to tell the story of this or any other trial. I am not going to put any ball and chain around them, I have too much respect for them. They will be reasonable and fair, I am sure.

They have a right to publish anything which they feel comes within the boundary lines of what I consider to be a rightful principle, namely, that the papers are mediums by which the public will know what is going on. The articles have to be reasonable. I assume no one up to the present time has read an article which would cause prejudice.

I will pause for a minute so that you may not let me know whether you have or not.

[A short pause. No response.]

The Court: Not having heard any response from the members of the jury, it is inescapably clear they have not read any article which would cause prejudice against the defendant or against the sovereignty of the United States. So, Mr. Koen, you may proceed to open.

[92] The laws of the United States, they usually come either from the provisions of the Constitution, for example, written into the Constitution is the crime of counterfeiting and that was covered by the Constitution itself; treason, and there are several others, but the right to pass legislation is predicated upon, for example, for the purposes of case, upon the provision of the Constitution which gives Congress the right to provide methods and means by which the government can get revenue. I could express it in another way, I want to do it in a way which will make

it perfectly fair, in layman's language, and point of view, it is frequently referred to as the Revenue Clause of the Constitution.

That involves the payment of taxes. Please, I beg of you, the return of an indictment, that is only the formal process of a charge, it isn't to be construed, as it is construed in some places, behind the iron curtain countries, the satellite countries, you are presumed to be guilty, you have to prove you are innocent. That is not so here. It would be very wrong. Mr. Koen would not want you to have that idea or anybody else.

Please don't get that point of view, keep your minds free from prejudice and bias. Please read what we are trying, it is covered by the four corners of this indictment.

I don't want to say anything else which would even suggest in the slightest way prejudicing the rights of the [93] defendant.

Is counsel satisfied with that statement I have made, having in mind the rights you saved, Mr. Maguire, there is no objection to what I have said to the jury?

Mr. Maguire: I have no objection to what you said, if your Honor please, I would still like to preserve the motion I made to you with respect to it.

The Court: That is right, which I passed upon, which I have denied and upon which your rights are saved. Don't hesitate to save all your rights.

Mr. Maguire: Thank you, your Honor.

Mr. Koen: May it please the Court, Mr. Foreman—

The Court: I would say that to you, Mr. Koen.

* * *

[100] The Court: Now, Mr. Reavey, in connection with the request of the United States Attorney I would appreciate it very much if you would get hold of the proper department and ask them to bring in here another blackboard. You want two?

Mr. Koen: I do, sir, but I doubt if we will need either of them today.

[101] The Court: I will take a recess now for 10 minutes.

[Brief recess.]

The Court: I am sorry, gentlemen, but I had an emergency matter of Judge Ford's that came up during my recess so that I had no rest. As I said, we have to—in turn each judge becomes the emergency judge and he is responsible for all matters, plus matters that concern other judges that may be away. Judge Ford is taking a vacation some place on the water so I had to go over it. [Brief pause.]

All right, Mr. Koen.

CARLTON L. BAIN, Sworn

Direct Examination by Mr. Koen

Q. Your name, sir? A. Carlton L. Bain.

Q. Where do you live, sir? A. 23 Maple Street, West Roxbury.

Q. By whom are you employed? A. By the District Director of Internal Revenue, Boston.

Q. In what capacity? A. Chief of the Returns, Index and Service Section.

Q. What, sir, are your duties? A. My duties are to have custody of the index files, the income tax returns as filed, the wage and excise tax returns and many other duties, as required.

Q. Were you asked to bring certain records here this morning? [102] A. I was, sir.

Q. May I see them? A. [Handing]

Q. [Examining] What are those documents, sir? A. I have the individual income tax returns for William V. and Isabel Massei of 29 Chrome Street, Worcester, Massachu-

setts for 1945 through 1950. Also a record of assessments from 1920 through 1945.

Q. Are these records records that are kept under your general supervision and direction, sir? A. Yes, sir.

Q. Do you have custody and control of them? A. I do, sir.

Q. May I have them again, please? A. [Handing]

[Mr. Koen hands documents to Mr. Maguire.]

Mr. Maguire: No objection to the tax returns for the years under the indictment, Mr. Koen.

Mr. Koen: I understand, may it please the Court, from what counsel says that there is an objection to one of these documents which I have in my hand which is the individual income tax return for 1945. Correct?

Mr. Maguire: Correct.

The Court: Do you object to that?

Mr. Maguire: I do, if your Honor please. We are [103] concerned with the years only 1946 through 1950.

Mr. Koen: I am going to offer it, sir, because the date of 12-31-45 is of some major significance in this case, as you can understand.

The Court: You are offering that with the promise you are going to connect it later on with other evidence; is that right?

Mr. Koen: I am not, sir, except as it is the terminal point and identical with the point which we will use as a starting point.

Mr. Maguire: I don't see how the tax return has any bearing on starting point, if your Honor please.

The Court: I will admit it, Mr. Maguire, over your objection. Your objection is noted. So far as those others are concerned, you agree they may be—

Mr. Maguire: I have no objection to the years 1946 through 1950.

The Court: I understand, Mr. Koen, it is understood

that this other income tax return which is being admitted is not being admitted on the basis of anything, that that contains, constitutes a matter before this jury for consideration as to the defendant's guilt?

Mr. Koen: That's correct.

Q. I ask you if you will describe that document. A. Yes, sir, this is the 1940—

[104] Mr. Koen: I'm sorry. May these be marked?

[Income tax return for 1945 marked Government's Exhibit No. 1.]

[Income tax return for 1946 marked Government's Exhibit No. 2.]

[Income tax return for 1947 marked Government's Exhibit No. 3.]

[Income tax returns for 1948 marked Government's Exhibits 4-A and 4-B.]

[Income tax return for 1949 marked Government's Exhibit No. 5.]

[Income tax return for 1950 marked Government's Exhibit No. 6.]

Q. I show you Government's Exhibit No. 1, sir, and I ask you what is that document? A. This is the 1945 individual income tax return of William V. and Isabel Massei of 29 Chrome Street, Worcester, Massachusetts.

Q. And the date of the filing as it appears on that, sir? A. January 8th, 1946.

Q. And the total income, sir, reported? A. The total income reported is $6,009.49.

Q. Will you give us the breakdown of that amount as it appears on the face of that return? A. Yes, sir.

Mr. Maguire: If your Honor please, I wonder if the tax returns won't speak for themselves? I assume they will be shown to the jury.

The Court: As a matter of fact Mr. Koen would have a [105] right to read it. I would permit it, and as long as

he is on the witness stand and that is his particular field of endeavor, it is far better from the viewpoint of what I consider to be consideration of your client's rights, to have him do it. He can interpret them properly, better than you or myself.

Mr. Maguire: I am not sure that is the thing. I don't want him interpreting them, if your Honor please.

Mr. Koen: I don't want to ask any questions designed to have his interpretation, your Honor.

The Court: If there is anything that happens, and it usually does, and there is nothing wrong about it, but if something takes place which contravenes the rights of this defendant or the rights of the sovereignty, I will ask the jury to disregard it. I know if I ask them to do it I am reasonably certain they will. All I can do is my best, to have them accept my judgment of the law and follow my advice. I will give it with kindliness and fairness, so far as I possibly can.

The Witness: Shall I proceed?

The Court: And give it with firmness, also.

The Witness: The income shown is from the City of Worcester, Worcester, Massachusetts, $2,903.53; another item, City of Worcester, Massachusetts, and parenthetically, "Census", $120; total, $3,023.53. Next, dividends and interest, $371.50. Next, other income detailed on the second page of the return, $2,614.46. Total, $6,009.49.

[106] Q. Tax paid, sir? A. The total tax or the amount paid with the return?

Q. Total tax paid. A. Total tax, $1,122.85.

Mr. Koen: May I show this to the jury, sir?

The Court: Oh, certainly.

[Mr. Koen hands the exhibit to the jury.]

Q. I ask you to look at Government's Exhibit No. 2. What is that? A. This is the 1946 individual income tax

return of William V. and Isabel C. Massei of 29 Chrome Street, Worcester 4, Massachusetts.

Q. Filed when, sir? A. Received February 17, 1947.

Q. And the total income? A. It is shown as $3,232.62.

Q. And the items which make up that total, sir? A. City of Worcester, Worcester, Massachusetts, $2,910; separately, City of Worcester, Worcester, Massachusetts, $80; total, $2,990; plus dividends of $242.62; grand total, $3,232.62.

Q. And the total amount of the tax paid for that calendar year, sir? A. $361.

Q. That is the calendar year 1946? A. Yes, sir.

[107] Mr. Koen: May I show that to the jury, sir? [Handing to the jury.]

Q. I show you this document, which is now Government's Exhibit No. 3, and I ask you what that is. A. The 1947 individual income tax return for William V. and Isabel C. Massei of 29 Chrome Street, Worcester 4, Massachusetts.

Q. And when was that filed? A. On January 5, 1948.

Q. The total income, sir, reported? A. $3,539.66.

Q. And the source, as reflected on the return? A. City of Worcester, Worcester, Massachusetts, $3,175.05; dividends, $60.19; interest, $304.42; total, $3,539.66.

[108] Q. A total tax paid, as per that return, sir? A. $416.

Mr. Koen: May I show that to the jury [doing so]?

Q. I show you now Government's Exhibit 4A, sir. I ask you what that is? A. This is the 1948 individual income tax return of William V. and Isabel C. Massei, of 29 Chrome Street, Worcester, Massachusetts.

Q. Total income reported on that, sir? A. It is $4,549.28.

Q. The source of that return is what? A. City of Worcester, Worcester, Massachusetts, $3442.41, dividends $1106.87, total $4549.28.

Q. And the total tax paid? A. $501.

Q. Now, sir, there is another document which I can describe for the record as Exhibit 4B. Will you tell me

what that is? A. Yes, sir, that is the amended 1948 individual income tax return of William V. and Isabel C. Massei of 29 Chrome Street, Worcester 4, Massachusetts.

Q. The total income reported on that? A. It is $4549.28.

Q. By comparison with 4A, sir, is the total income reported on that the same as in 4B? A. On the face of the return, yes.

[109] Q. And the total tax? A. The total tax shown is $457.

Q. That is on 4B. That is the amended return? A. That is correct, sir.

Q. And the total tax shown on the original is? A. $501.

Q. By the way, is there anything on there to indicate when that amended return was filed? A. January 14, 1949.

Mr. Koen: All right, sir. May I show these to the jury, sir [doing so]?

Q. May I show you the next document which is Government's Exhibit 5. I ask you what that is? A. The 1949 individual income tax return of William B. and Isabel C. Massei of 29 Chrome Street, Worcester 4, Massachusetts.

Q. Total income reported or reflected on the face of that return is what? A. $5004.91.

Q. From what sources does the face of the return show that money came? A. City of Worcester, Worcester, Massachusetts, $3623.54 and dividends $1308.52. Other income—I beg your pardon, interest $72.85. There is no other income, that was my error.

Q. Total of what? A. $5004.91.

[110] Q. And the amount of tax paid? A. $549.02.

Q. When, sir, was that filed? A. On January 9, 1950.

Mr. Koen: May I show this to the jury, sir [doing so]?

Q. Now, Government's Exhibit 6, sir, what is that? A. This is the 1950 individual income tax return of William B. and Isabel C. Massei, of 29 Chrome Street, Worcester, Massachusetts.

Q. What is the total income reflected on the face of that return? A. $6701.75.

Q. From what sources, as appears on the face of the return, does that come? A. City of Worcester, Worcester, Massachusetts, $4158 and dividends, interest or other income as scheduled on the second page, $2543.75, total $6701.75.

Q. And the total of the tax paid? A. $862.48.

Q. The date on which that was filed, sir? A. January 9, 1951.

Mr. Koen: Thank you. We offer these documents. I understand there is an objection to them.

Mr. Maguire: There is.

The Court: Well, will counsel come up to the bench? [111] That is in keeping with our system, which I think is the better way to do. It isn't that I am trying to keep evidence away from you, I haven't got any idea what this is, if it is legally admissible. If it isn't, then I cannot admit it. If it is legally admissible, I must admit it.

These cases are not tried, as you settle problems of a business or social nature in your place of business. In many ways they are. We are dealing with questions of admissibility of evidence. Much of it comes in the orbit of my judicial discretion. Some of it doesn't. When I do this it is to save any possibility of prejudice or error.

[Conference at the bench as follows]:

The Court: Let us find out what this is.

Mr. Koen: This, may it please the Court, is a certificate of assessments and the payments made, assessments and payments made by William V. Massei, as they are contained in a transcript of the records covering the individual or the years which are certified by the Collector of Internal Revenue, Roger M. Foley.

You will notice one for the year 1920. There is none for the intervening years. There is a certificate cover-

ing the years 1940 to 1945 inclusive, that I will withdraw, the 1945, because we already have the original tax return in evidence, so that they cover the period from 1940 to 1944, inclusive.

[112] The Court: 1940 to 1944, inclusive?

Mr. Koen: Inclusive, and 1920. There is nothing between 1920 and 1940.

The Court: Why do you think it is admissible, what bearing does it have on any issue in this case?

Mr. Koen: Well, it shows that these returns, and we will show by evidence that the amount of tax which this man paid on income during this period of years could not have resulted in any such holdings as the man now has from reported sources of income.

The Court: These were assessments that were made?

Mr. Koen: Assessments and payments.

The Court: And payments on the assessments.

Mr. Koen: Yes. Don't misunderstand the term, assessments.

The Court: I probably do misunderstand it.

Mr. Koen: What it really is, is a transcript of his return, showing the amounts of money which he paid on his taxes.

The Court: It has already been introduced?

Mr. Koen: No, there is an objection.

The Court: I mean, there was paid something in addition?

Mr. Koen: No. I don't make myself clear.

The Court: Yes, you do. I think I know what you [113] mean. What you mean is—

Mr. Koen: This is a recitation of the money he paid in prior years, in the form of taxes on income. They call it the assessment roll, and payment roll. I am offering it.

The Court: You are asking to have it admitted, for what purpose?

Mr. Koen: For the purpose of establishing this man's income was within the type or bracket and was of such small size that he could not have accumulated any sizable amount of money. I think it has a bearing on the net worth of the man.

Mr. Maguire: First, if your Honor please, we are only concerned with the taxable years, the ones under indictment, 1946 through 1950. I don't believe this is a record kept in the usual course of business there. This I believe was made up in response to a request either by the Internal Revenue or the Department of Justice. This is not the usual thing. They don't have it in Internal Revenue in connection with you or me. I don't believe they have that sort of record for taxpayers there.

The Court: This is compiled from records that they have?

Mr. Maguire: I do not know.

The Court: Is it?

Mr. Maguire: Presumably.

[114] Mr. Koen: I approached the bench because there was an objection. If you want me to determine that, I think the answer is, this is a compilation and a certificate made from permanent records of the Bureau of Internal Revenue, properly certified by the person, at that time the Collector of Internal Revenue.

The Court: Mr. Witness, will you come over here?

The Witness: Yes, sir.

The Court: I think I better bring you over here [to the corner of the bench] so there will be no possibility of the record being heard, let it appear I am coming over here, it is obvious I am going to try to

rule on this without having anybody hear. Go ahead.

Mr. Koen: I show you this document that is entitled Certificate of Assessments and Payments. I ask you what that represents and what it is?

The Witness: This represents a transcript from our ledger in the office and it is properly certified by our then Collector of Internal Revenue, Roger M. Foley, this was prepared on December 7, 1951.

The Court: You mean it was prepared at that time?

The Witness: Yes, sir.

The Court: Tell me, is that record in your custody?

The Witness: The records were in the warehouse [115] under my general custody.

The Court: How long have you had custody of these records?

The Witness: I was only in that particular position in 1955 in October. Prior to that I had been absent from that particular position for about a year and a half and prior to that I spent about six years in charge of most of the records and of the files of the office.

The Court: When was that, when were those six years?

The Witness: From August 1948 through April 1, 1954.

The Court: You were in charge of that?

The Witness: Yes, sir, of the general files and records.

The Court: Then in 1954 you were given another assignment?

The Witness: That is right, sir.

The Court: Before 1954 were you in there? What was your training? How long had you been in the service?

The Witness: I have been with the Internal Revenue Service since February 1945, with the exception of a period, I was absent, I wished to resign.

[Discussion off the record.]

The Court: That is a part of the record?

[116] The Witness: It is taken from—

The Court: It is kept in the regular—

Mr. Maguire: No, if your Honor please, this record which he has here, the original records are the best evidence. This was made up only in response to a request by the government.

Mr. Koen: That is right.

Mr. Maguire: This is not a usual record.

The Court: Who is it made up by?

Mr. Maguire: If they want to prove these records, get them in here. May I ask this question?

The Court: I think I will let you get a bit of a head start [addressing the jury]. It is kind of a bad day. If you want to go out to lunch, get the jump on the crowd at one o'clock. Why don't you go along? I will bring you back at quarter past two.

While I am the emergency judge, I am going to take that time, I have to pick up a lot of things, I will try to get back at quarter past two myself. I will let you go along.

[The jury leaves the courtroom for the noon recess. The conference at the bench continues as follows]:

Mr. Maguire: Are these payments you have listed here only payments that accompany the tax return? I ask if these records of payments listed are payments which accompany tax returns?

[117] The Witness: Not only that, sir, they also include payments subsequently made on that return. The first one you see here was paid in four quarterly instalments, all four are shown here.

Mr. Maguire: This is not the best evidence, it is purely a compilation, apparently made up by someone else, presumably from Internal Revenue records, whatever they are.

Mr. Koen: What is the source of the information which is on this certificate?

Mr. Maguire: Did you make the compilation?

Mr. Koen: I am asking him, please, what is the source of the information which is contained on that certificate which is signed by the then Collector of Internal Revenue, Mr. Foley?

The Witness: The ledgers which are all kept in the Federal records.

The Court: These were prepared back in the days of Mr. Foley. He has been out of Boston quite a few years.

Mr. Koen: That is right.

The Court: These were prepared not for this trial but they were records you got from some depository where these records were stored, isn't that right?

Mr. Koen: No. Let me say this—

The Court: Obviously this is signed by Mr. Roger [118] Foley.

Mr. Koen: If I may be allowed to state this, I don't think there will be an objection, I think these were prepared by Roger Foley at the request of some other section of the Treasury Department, that is a fair statement.

Mr. Maguire: And not by the witness?

Mr. Koen: Not by the witness.

The Court: These records have been kept in your department in the regular and ordinary course of business?

Mr. Maguire: Not these.

Mr. Koen: The records from which this transcript has been made.

The Court: The records from which this transcript has been made.

The Witness: That is our transcript, every one of them, I believe.

The Court: Is this Roger Foley's own signature?

The Witness: It is, to the best of my knowledge.

The Court: That was 1951, they were prepared in 1955.

The Witness: That is right.

The Court: They have been in the custody of the office and they were a part of the records kept in the regular and ordinary course of business, isn't that right? [119] If someone asked for a compilation, asked for the preparation of a document, such as this certificate of assessments and payments, that is on income, is it?

The Witness: It isn't income at all.

The Court: When it is, it is kept, it is part of the regular routine of the matters done in the ordinary and regular course of business.

Mr. Maguire: I have nothing further to add. It isn't the best evidence.

The Court: That is your only objection?

Mr. Koen: Let me ask you this. Are you familiar with the original records from which this transcript was made, the certificate?

Mr. Maguire: Of his personal knowledge?

Mr. Koen: The type of record.

The Witness: Yes, sir.

Mr. Koen: Will you describe that to the Court?

The Witness: These are kept in ledger books, large pages having, generally speaking, ten accounts to the page. Each one is identified by not only the taxpayer's

name but his number and return for that particular year. The payments as made are entered on those loose leaf pages and the pages which contain completely paid up accounts are consolidated into closed books and then put in the warehouse.

[120] Mr. Koen: Those are what is commonly referred to as the assessment books.

The Witness: That is right, sir.

The Court: When they were subpoenaed or otherwise, you were asked to bring the records, these were part of the records you brought?

The Witness: Yes, sir.

The Court: The same as the returns are usually kept in the regular and ordinary course of business?

The Witness: That is right, to bring the original records on these, would mean bringing over here a number of large books, each one of which might be so thick [indicating].

Mr. Koen: May the record show—

Mr. Maguire: Those are the original records.

The Witness: Those books would be—

Mr. Koen: May the record show that he has indicated the thickness of the book to be approximately 6 inches, each book would be approximately 6 inches.

The Witness: When bound.

The Court: 6 inches. What is your other objection?

Mr. Maguire: The other objection is to the relevancy. We are concerned with five years, 1946 to 1950. I don't see how these have any bearing.

The Court: I will hear you on that.

[121] Mr. Koen: Well, there are many, many cases of a net worth nature where evidence of this sort has been admitted and the Court has ruled properly for the purpose of showing the man's financial condition

as by his returns for the years prior to the indictment years, or the prosecution years, I should say. Here is a man who shows, by his own tax returns, that he did not have any holdings, the nature of which would reflect the size and amount which we charge him with.

Mr. Maguire: May I point out to you, if your Honor please, this shows merely what the man paid. It does not show—

Mr. Koen: It doesn't show what income he would have had—we will have that evidence.

Mr. Maguire: You don't know his deductions, you don't know his other expenditures which go to make up the tax return and, aside from being irrelevant, your Honor, to admit this is prejudicial to the defendant in that—unless they are going to give the whole picture—

The Court: Do you take the position the government isn't entitled to do what they have done in other net worth cases? In the Adonis case the government was permitted to go back into the '20's.

Mr. Maguire: Well, I don't quarrel with their [122] right to do that, if your Honor please—

The Court: He made these payments.

Mr. Maguire: Very good. But the payments do not indicate what his income was during the particular years involved, and you can't reconstruct that unless you know how many dependents he had and what sort of other deductions—

Mr. Koen: You can work it out from the rate book.

Mr. Maguire: I don't believe you can, unless you know the facts and unless the government is prepared to do that—

Mr. Koen: His wife—

Mr. Maguire: That is up to the government. It is prejudicial to allow this in.

The Court: I will admit it and save your rights.

Mr. Koen: Don't forget, may it please the Court, there are 20 years, approximately, when no income tax return was filed, which indicates either one of two things, and I will give him the benefit of the doubt, because he was working at the time, that his income was not sufficient to file a return.

Mr. Maguire: I think we will explain why there were no payments listed in those years.

The Court: I will admit it as a part of the picture.

[123] Mr. Maguire: Subject to being tied up, if your Honor please?

Mr. Koen: I don't think—

The Court: I am going to admit it and if it later on becomes inadmissible you can make a motion to strike. On the basis of the United States Attorney's statement, and weighing your objections, I will admit it.]

[Certificates of Assessments and payments marked Government's Exhibit No. 7.]

[Luncheon recess.]

[124] AFTERNOON SESSION

The Court: Now, the record will appear that I have admitted that.

Mr. Koen: It has been marked as Exhibit 7, sir.

The Court: That's right, and your objection is noted, Mr. Maguire, and your rights are saved.

CARLTON L. BAIN, Resumed

Direct Examination by Mr. Koen, Continued

Q. I show you this group of documents, sir, and I ask you what they are. A. These are certificates of assess-

ments and payments on income tax accounts. We refer to them as transcripts from the records of account kept at the office. In each case they are certified by the Collector of Internal Revenue.

Q. And those are certified by whom, sir? A. These all are certified by Roger M. Foley.

Q. As of what date? A. As of December 7, 1951.

Q. And what was his position then with the Treasury Department or, particularly, with the Bureau of Internal Revenue? A. He was Collector of Internal Revenue for the District of Massachusetts.

Q. The first of those sheets, sir, covers what year? First of all, covers what person? A. William V. Massei of 29 Chrome Street, Worcester, Massachusetts.

[125] Q. And the year? A. 1920.

Q. And the list and year, that means what? A. The list and year means the month and the year in which the account was listed and within that month we have certain numbers which appear in these documents, in the following column, identifying each tax return.

Q. And what year and month was that listed, sir? A. This was listed in April, 1921 on the regular list.

Q. And the next column is what, sir? A. That is the account number for Mr. Massei for the year 1920 and it is Account No. 41062.

Q. And the amount assessed? A. $19.79.

Q. Do you know what the phrase "amount assessed" means on this certificate, sir? A. Yes, sir, it means the amount which was due to be paid on the income tax return at the time the return was filed.

Q. If I may, skipping over to the last such column, the title of that is what, sir? A. Adjustments of overassessments.

Q. And the notations under that? A. We have one, "Paid 6-18-1921".

Q. The next such certificate, sir, covers what year? A. The year 1940 income.

[126] The Court: May I interpose to say this, Mr. Foreman and Ladies and Gentlemen of the Jury? I don't want to break in on your trend of thought, Mr. Koen, but as this evidence goes in, please, I beg of you, refrain from making any conclusions. Just try and have a factual remembrance of it, and your memory is the final test. Suppose I should make reasonable comment, which I haven't the slightest intention of doing, or reference to testimony, which I have no intention, at the present time, of doing, if I made reference to the testimony of Witness X or Witness B, I could only do it in an advisory way. I would be obliged to say, "Disregard what I say if what I say factually is not in keeping with your memory of what the testimony was." That's the story. And so I have admitted these, Mr. United States Attorney, with the understanding that this is to be connected with the issues that are raised and, Mr. Maguire, I made it clear to you that if they are not, you can make a motion to strike.

I want to say, also, parenthetically, I picked 14 of you for this jury. That has only the one significance. I have sat here on one very, very important case and I was on trial for approximately three weeks and a half and the trial was a trial where I was reasonably certain that if one of the jurors was taken sick, and God forbid that will happen to any of you, I would have had a mistrial because I was reasonably certain that the attorneys never would have agreed to have gone along with 11 jurors. That was their right and privilege.

[127] I have seen myself sit here in the trial of several cases where the attorneys estimated the time at four or five days. I saw one of those cases go along for approximately 18 trial days, and that is three weeks, and so that, without consulting counsel in the light of the nature of this case,

and I don't mean the nature of this case in so far as it's the kind of a case that should have any special emphasis but because of the factual—I don't mean to say—difficulties, but because of the careful highway over which the government and counsel for the defendant have to travel, and because of their right and privilege to come before me and object to certain features of evidence, in the exercise of my discretion I had two extra jurors drawn.

Now upon the assumption this case goes through and it reaches you for consideration on the issues that are raised and the law, at that time I will excuse the two extra jurors. God forbid, if some one of you is taken sick and there is a delay, the 13th juror would step in and take the position of the juror that found himself handicapped.

For example, if one of the jurors were seriously sick or dying, it would be rather a cruel thing to compel someone to sit, and, of course, both counsel would be very happy to agree they not sit, but I really feel that in criminal cases the defendant is entitled to have 12 citizens, and the Constitution says so, and I am quite strong for it. I think that ought to be [128] done.

I don't think it is so important in civil cases as it is in criminal cases, which affect a person's liberties. And they are sacred. Now that is the reason why we have 14. I thought I would tell you that, so you wouldn't think it was because of any special emphasis in this case.

It is only predicated upon the theory that the case might take a little time to try, that's all, to present all the evidence. Therefore, whenever I see that, from now on I am going to resolve all doubts in favor of my own state of mind and the state of mind of you fine citizens, sort of a happy hand ready to go on in case you should be unable, for some reason or another, to continue.

That statement is perfectly satisfactory, isn't it?

Mr. Maguire: Yes, it is, your Honor.

Q. The next such certificate is what, sir? Will you give us the details of it, as I have questioned you on the first one? A. This is a certificate in re William V. Massei, 29 Chrome Street, Worcester, Mass., on income tax for calendar year 1940, listed in January, 1941 in the regular list, No. 600242. The amount assessed is $24.30. $24.30 was paid.

Q. Will you read the remark at the bottom? A. The remark: Reduced by audit $4.85, and a schedule number is given here, IT-R77119—12-4-41.

Q. What does that mean? [129] A. That would indicate that a refund had been sent to the taxpayer at that time for this $4.85 by which the tax had been overpaid.

Q. All right. Overpaid or reduced by audit? A. Reduced by audit.

Q. The next one. A. The next one is William V. and Isabel C. Massei, 29 Chrome Street, Worcester, Mass., income tax for the year 1941, and this is in the January, 1942 regular list, No. 801732, and the amount of the assessment is $126.48. $126.48 was paid.

Q. The next one. These are in duplicate? A. That's correct, they are in duplicate. The next one is for William V. and Isabel C. Massei, 29 Chrome Street, Worcester, Mass., income tax for the calendar year 1942, listed on our regular list, March, 1943, No. 272338, and the amount assessed is $304.03, paid in two payments—I beg your pardon—two payments were made, $76.03 and $76.00. The account was later closed for $152.00, in accordance with A. & C. Mimeograph Collection No. 5621.

Q. Are you familiar with that, sir? A. That is in 1942 or rather in 1943, that is the time when we went on the Pay-as-you-go-basis, when the current tax payment account was put through, and at that time you probably will recall on the 1943 return it's necessary to show the amount of the 1942 income tax and to take that into consideration

in [130] computing the 1943 tax. A certain amount of the 1942 tax was forgiven.

Q. That is the so-called Forgiven Sheet, is that right? A. That's right, sir.

Q. The next such certification, sir? A. The next one we have is for the Estimated Income Tax Account for the year 1943 for William V. and Isabel C. Massei, 29 Chrome Street, Worcester, Mass. Two estimates were made. The first one is on our September, 1943 regular list, No. 3003385, and paid on September 6, 1943, $155.94. The second payment that year was on the December, 1943 regular list, No. 8653718, December 15, 1943, paid also $155.94. That is on the Estimate.

Q. The next one, sir. A. This is on the regular income tax for 1943 for William V. and Isabel C. Massei of 29 Chrome Street, Worcester, Mass., listed for the year 1943, listed in the February, 1944 regular list, No. 819786. The amount assessed $8.90. The amount paid $8.90.

Q. The next one. A. The next one is the 1944 Estimated Account for William V. and Isabel C. Massei of 29 Chrome Street, Worcester, Mass. We have three payments shown here. April, 1944, the regular list, No. 3001368, paid on April 5, 1944, $34.75; in June, 1944, the regular estimate list, 8031096, paid on June 10, 1944, $34.75; the September estimate list for 1944, No. 8619984, paid on September 7, 1944, $69.50.

[131] Q. That is the last certificate, is it? A. No, sir. We're still going strong.

Q. Oh, all right. A. Then we have the regular income tax record for 1944. William V. and Isabel C. Massei, 29 Chrome Street, Worcester, Mass., January, 1945, regular list, No. 2004437. The amount assessed is $35.60, paid on January 11, 1945, $35.60.

[132] Mr. Koen: Do you want that to go in?

Mr. Maguire: No.

Mr. Koen: We have already got it in.

The Witness: All right.

Mr. Koen: This is an exhibit, sir; but may I detach the 1945 remarks because the '45 return is already in, and counsel for the defendant has no objection?

The Court: No objection to that.

Q. Now, sir, you have testified as to these certificates, and the first of such is 1920, and the next of such is for the calendar year 1940. A. Yes, sir.

Q. Do you know whether or not any such income or certificates of assessment were made for the intervening years between 1920 and 1940? A. There were none, sir. There is no record of a tax return being filed for the years 1921 through 1938. For the year 1939 we would not have any such record because it was a non-taxable return on which no ledger account was necessary.

Mr. Koen: Wait a minute, please. [Confers with Mr. Maguire.] May we go to the bench, sir?

The Court: Oh, certainly.

[Conference at the bench, during which the following was recorded:—

Mr. Koen: I have discussed this matter with Mr. Maguire and for the first time in many [133] days we are in agreement. For the period from 1921 to 1938, I think counsel and I can agree that Mr. Massei was a municipal employee and as such was not required to file or to report for income tax purposes the salary that he received. Is that correct?

Mr. Maguire: On his salary that he received as a municipal employee.

Mr. Koen: Yes.]

The Court: I think you may state that, Mr. Koen, to the jury, and I'm sure Mr. Maguire will agree.

Mr. Maguire: Yes, sir.

Mr. Koen: With reference to the years 1921 to 1938,

Mr. Massei was a municipal employee in that he was employed in the Police Department of the City of Worcester and was not required to report for income tax purposes the salary that he received as such municipal employee.

I have no further questions of this witness, Mr. Maguire.

Cross Examination by Mr. Maguire

X-Q. Mr. Bain, this record of assessment that you have been reading from does not give the income that the taxpayer declared in any of those years that you have named? A. No, sir, it does not.

X-Q. So you were not able to help us on that. Furthermore, you [134] can't help us, I take it, on what the man's dependents were, what his deductions were, in those years? A. No, sir, I cannot.

X-Q. And such things as business losses, or whatever else there might be, you have no information in the Internal Revenue records bearing on that? A. No, sir.

Mr. Maguire: That is all.

Mr. Koen: That is all.

The Court: That is all, sir.

Mr. Koen: The representative from the Worcester Five Cent Savings Bank.

LAWRENCE H. CROSS, Sworn

Direct Examination by Mr. Koen

Q. What is your full name, sir? A. Lawrence H. Cross.

Q. And where do you live, sir? A. In the Town of Holden, Massachusetts.

Q. By whom are you employed? A. Worcester Five Cents Savings Bank.

Q. In what capacity? A. Assistant vice-president.

Q. And how long have you been with the Worcester Five Cent Savings Bank? A. 49 years.

[135] Q. You have been asked to bring certain records here today? A. I have, sir.

Q. Have you brought those records with you, sir? A. I have photostatic copies of everything except one which was the microfilm, which we have made a true copy of.

Q. May I see those, please? A. Yes, sir [Handing].

[Mr. Koen inspects documents.]

Q. I return these documents to you, sir. I think you previously told us how those documents came into your possession from the microfilm setup; is that correct? A. These are photostatic—

Q. Photostatic copies. A. Except that one, because it was on microfilm.

Q. All right. Now, sir, in your bank do you have an account which stands, or which bears No. 308448? A. We do, sir.

Q. In whose name? A. It stands in the name of Isabelle C. or William V. Massei.

Q. And when, sir, was that account opened? A. That account was opened on May 3, 1945.

Q. Can you, sir, by referring to your ledger card tell us exactly what the amount was in that account as of December 31, 1945?

Mr. Maguire: If your Honor please, I object. May we [136] step to the bench?

The Court: Oh, certainly.

[Conference at the bench, during which the following is recorded:—

Mr. Maguire: This is a joint account, your Honor, and I object to it unless the Government is going to introduce evidence that it is Mr. Massei's account rather than Isabelle's, his wife's; and, just to anticipate, there are other bank accounts in the name of Mrs. Massei alone. Those we object to.

Mr. Eden: I think there will be evidence here

which will indicate that Mrs. Massei during this period, and during most of the period covered in the indictment, was a housewife.

Mr. Maguire: I don't think that solves the problem, if that is all they intend to do to tie it in. It doesn't solve the problem.

The Court: I think it is admissible along the highway of approach that is necessary. If during this period she was a housewife, obviously there is no source of earning power. The Government tells me they are going to show that.

Mr. Koen: There is a further item with respect to the item of interest which was to be [137] returned.

Mr. Maguire: Of course that is not conclusive. They have to build up this theory of net worth, and they have to prove everything they allege. The fact it is a joint account is not conclusive proof.

The Court: Well, as a matter of fact, suppose—so I won't be personal—suppose I am under investigation and they discover that which is true, namely, that I have a couple of savings bank accounts. I know how I have them. I have them in my name and my wife's name, and there is good reason for it because if I should die it is hers.

Mr. Maguire: Fine. Let him prove that.

The Court: You do it as a medium, as a sort of protection for your family, for your wife. Is that right?

Mr. Maguire: If they can show that, fine. No objection.

The Court: I will admit it as a step in a proceeding in which the Government is entitled to proceed. I am admitting it and will save your rights.

Mr. Maguire: Of course the burden is on them.

[138] The Court: The burden is on them to do it

within reasonable means that are available to them—yes, certainly. If there was interest credited which was put on his return, of course it is taxable, and I suppose Mr. Koen will clarify it, if it is possible, if there was interest paid and if it was returned.

Mr. Maguire: It was a joint return, your Honor.

The Court: This is a community return. I will admit it.

Mr. Maguire: Save my rights.]

Q. What was the balance in that account on December 31, 1945? A. $2,006.67.

Q. I am not too sure. Did I ask you in whose name this account was set up? A. The joint account of Isabel C. or William V. Massei.

Q. What was the balance in that account as of December 31, 1946? A. $2,161.91.

Q. From your ledger card, can you tell us the dates and amounts of deposits made in that year? A. Yes, sir.

Q. If you will, please. Including any dividends or interest. A. Well, the January dividend in 1946 was $20.06; the July dividend was $20.34; there were deposits of $50 on May 3d and $64.84 on August 21st.

Q. Now, sir, can you tell us from that card what deposits [139] there were and what dividends were paid during 1947?

The Court: What was the balance for that year in that account?

The Witness: At the end of '46?

The Court: Yes.

The Witness: $2161.91.

A. There was a deposit of $50 on January 2d; then a dividend credit of $21.40; a deposit of $10 on February 3; the July dividend of $22.40; leaving a balance at the end of 1947 of $2265.71.

Q. Now, sir, during 1948, can you tell us what deposits

were made, what payments were made, and what dividends if any, were paid. A. There were no deposits during the year, sir. There was a withdrawal of $2200 on January 2d, and a credit of a dividend of $22.65, and a July dividend credit of 88 cents.

[140] Q. The $22.65 dividend was paid when, sir? A. Due as of January 1st, sir.

Q. Thank you. And the balance at the end of that year, as of December 31, 1948? A. $89.24.

Q. Now, sir, what activity was there in the account during the year 1949? A. Nothing but the two dividend credits of 89 cents in January and $1.13 in July.

Q. And the balance as of the end of that year? A. $91.26.

Q. Will you tell us the activity in the account for the year 1950? A. The first entry is a deposit of $150 on January 3rd, a dividend credit of $1.14, the July dividend of $3.63, a deposit of $100 on November 1st, a withdrawal of $300 on November 29, which leaves a balance at the end of 1950 of $46.03.

The Court: How much was the balance?

The Witness: The last one I gave you, sir? $46.61.

Mr. Maguire: This is subject to my objections, if your Honor please.

The Court: That's right. I have saved your objections to this whole line, you know, Mr. Maguire. You object to the admissibility of it and I have allowed it, and your rights ran to all of them. You are saving your rights, [141] and it runs to the whole thing, so the record will note exactly how comprehensive I want your rights saved.

Mr. Maguire: Thank you, your Honor.

The Court: I want it to cover the whole overall picture.

Mr. Koen: I offer this group of documents submitted by this witness with reference to Account No. 308448 of the Worcester Five Cents Savings Bank.

The Clerk: Government's Exhibit 8.

[Group of documents with reference to Account 308448 of the Worcester Five Cents Savings Bank marked Government's Exhibit 8.]

Mr. Koen: I have no further questions of this witness.

Mr. Maguire: No questions, Mr. Cross.

Mr. Di Mento: The Worcester Federal Savings and Loan.

JAMES R. STONE, JR., Sworn

Direct Examination by Mr. Di Mento

Q. What is your name, please? A. James R. Stone, Jr.

Q. Your address? A. Paxton, Massachusetts.

Q. And your occupation? A. Chief Accountant.

Q. At the Worcester Federal Savings and Loan Association? A. Right.

[142] Q. In response to a subpoena have you brought certain documents of that bank with you? A. I have.

The Court: What is the name of the bank?

The Witness: The Worcester Federal Savings and Loan Association.

Q. Does the bank have another name or has it had another name at some time? A. No. Well, it might have had the word "Co-operative" in it, the Worcester Co-operative Federal Savings and Loan.

Q. At some time before? A. Yes.

Q. Now do you have with you documents relating to Account No. 23352? A. Yes.

Q. Those are ledger cards relating to that account? A. Photostatic copies, yes.

Q. Do you have any other documents relating to that account? A. I have the original signature card and withdrawal—

Q. Take out all the documents you have relating to that account. A. Yes, sir.

Q. Now referring to the ledger card relating to that

account — pardon, me — in whose name is that account? A. Isabel C. Massei.

[143] Q. And the address? A. 29 Chrome Street, Worcester 4, Mass.

Q. That appears on the ledger card? A. That is right.

Q. Referring to the ledger card, can you tell us what the balance was in that account on December 31, 1945?

Mr. Maguire: If your Honor please, this is an account in Mrs. Massei's name alone as distinguished from the previous account which was joint. I would like to object to this.

Mr. Di Mento: Your Honor, what we have said before at the bench applies equally to this type of account.

The Court: Are you going to offer evidence to show she was a housewife and had no means of support, except what she would get from her husband?

Mr. Di Mento: Yes, your Honor.

The Court: I will admit it.

Mr. Maguire: Save my rights, if your Honor please.

The Court: Yes.

Mr. Maguire: Do I understand that my objections will be saved on subsequent bank accounts?

The Court: Everything. That's right. I do that upon the representation that the government is going to offer evidence later on. I ask the jury to accept it in the spirit in which it is being admitted, with a warning that, with a caution to be very careful not to come to any conclusion on [144] any of this. I want to assure you I have not. I have been trying cases and sitting here as a Judge for quite a few years. And you try to do the same. If you did anything else, you would be doing the wrong thing. You would be putting the flag at half-mast. I know you won't do it.

We have a human way of doing things. You have to listen to facts. You have to apply the rule of reason that

you would apply to matters that come up in your every-day walks of life, except it is limited here to certain rules, principles of law I will explain later on. The formula is the same. You sit down and discuss with your wife or with your husband the question of buying a house, building a house, and you look over the plans. You have plans made and you get estimates. You don't form the conclusion as to what you are going to do until you have all the facts and figures before you. Now that is what an opinion means. Get all the facts. It is particularly important in this case to refrain from doing anything but that. Remember this defendant is entitled to his day in court. Please refrain from doing anything except taking it in factually, with no prejudice or bias of any kind, one way or the other. That is the only way I know to help you. This evidence is offered. I am letting it in with no implication, no suggestion that I am giving it the imprimatur of value or non-value or anything else, because it's admissible testimony. All right.

[145] Q. Will you please give to us the bank balance in that account on December 31, 1945? A. $162.26.

The Court: May I refer back to that, Mr. Maguire and Mr. Koen? Does that statement, what I have made, coincide with your viewpoint on the rights of the government, and coincide with your viewpoint on the right of your client? Does it, Mr. Maguire, what I said before?

Mr. Maguire: Yes, your Honor. I agree with that, your Honor, except as it applies to the admissibility of this evidence at this time.

The Court: I'm not trying to minimize, you know, your rights. I will protect you on those. I am not trying to modify my ruling. I am trying to explain to the jury the human equation, as it applies in the trial of cases.

Q. May we please have the comparable figure for December 31, 1946? A. $318.39.

Q. And the same figure for December 31, 1947? A. $437.97.

Q. $437.97? A. Correct.

Q. And the comparable figure for December 31, 1948? A. $560.40.

Q. And the balance on December 31, 1949? [146] A. $686.00.

Q. And the balance on December 31, 1950? A. $784.88.

Q. May I have a ledger card?

Mr. Di Mento: I am going to offer this, without objection from Mr. Maguire—

Mr. Maguire: Well, if your Honor please, my objection has already been noted. Did you say "without objection"?

Mr. Di Mento: I did. I meant as to the document, without objection.

The Clerk: Government's Exhibit 9.

[Savings Account No. 23352, Isabel C. Massei, Worcester Federal Savings and Loan Association, marked Government's Exhibit 9.]

Q. Now you have a similar record for Account No. 23353? A. That is right.

Q. And in whose name is that account? A. Isabel C. Massie, 29 Chrome Street, Worcester 4, Mass.

Q. Will you please give to us the balance on deposit in that account on December 31, 1945?

The Court: What name is this?

The Witness: Isabel C. Massei.

The Court: Your objection is noted. That is understood. A. $344.75.

Q. And the balance on December 31, 1946? A. $657.55. [147] Q. And the balance on December 31, 1947? A. $897.24.

Q. And the balance on December 31, 1948? A. $1,142.68.

Q. And the balance on December 31, 1949? A. $1,394.45.

Q. And the balance on December 31, 1950? A. $1,592.49.

The Court: Those are two separate accounts?

Mr. Di Mento: Two separate accounts, numbered differently.

The Court: In her name?

Mr. Di Mento: Numbered consecutively and in her name. I am offering the ledger card in evidence.

The Clerk: Government's Exhibit 10.

[Ledger card No. 23353, Isabel C. Massei, Worcester Federal Savings and Loan Association, marked Government's Exhibit 10.]

Mr. Di Mento: Your witness.

Mr. Maguire: No questions.

Mr. Koen: The Worcester Mechanics Savings Bank.

DEAN E. STOREY, Sworn

Direct Examination by Mr. Koen

Q. What is your name, sir? A. Dean E. Storey.

Q. Will you please speak up? Where do you live, sir? [148] A. Holden, Mass.

Q. By whom are you employed? A. Worcester Mechanics Savings Bank.

Q. In what capacity? A. Assistant Treasurer.

Q. Have you brought certain records in response to a summons? A. I have.

Q. Are those records normally kept in the usual course of business? A. That's right.

Q. May I see them, sir.

[Mr. Koen hands documents to Mr. Maguire.]

Mr. Maguire: This is another account in the name of Mrs. Massei.

Q. I show you first the card which is on the top of those documents, sir. What is that? Identify it. A. This is a

copy of a ledger record of Account No. 130332, Isabel C. Massei.

Q. I'm sorry. I didn't make the question clear. I was referring to this particular card [indicating]. A. This is a signature card filed with the bank on March 4, 1939, signed by Elizabeth C. Massei.

Q. Will you read the contents of that signature card, sir? A. Residence: 29 Chrome Street, Worcester; Occupation: Housewife; Birthplace: Worcester; Date of Birth: May 12, 19 ; [149] Husband's Name: William V.; Father's Name: G. Hosmer Cumming; Mother's Maiden Name: Mabel MacGilvray.

Q. By the way—

Mr. Koen: We have not given to the jury the last two or three series of exhibits. May I show them to the jury?

The Court: All right. I would suggest you start one in the back row and one in the front row.

Mr. Koen: All right, sir. I'll give one to the back room, too.

The Court: Well, give some to the back room, too. A lot of great men came out of the back room, too. A lot of great Americans came out of a back room and became great leaders in our free society. I hope the ray of sunshine will shine upon you men.

Q. In support of that signature card, you have a ledger card, which is retained by the bank? A. Yes, sir.

Q. Do you have—well, directing your attention to December 31, 1945, can you tell us the balance? A. $3,362.48.

Q. Now, sir, will you give us the list of deposits and withdrawals? Read into the record, if you will please, the list of deposits and withdrawals from December 31, 1945 up to and including December 31, 1946, and give us, in addition, the balance outstanding on that date? [150] A. January 4, 1946, deposit of $37.94, January 8, a withdrawal of $755, January 15, $25.41, February 8, a withdrawal of $100,

July 15, interest of $25.70, August 28, a withdrawal of $100, December 4, a deposit of $300, and a balance on December 31, $2,796.53.

Q. For the year 1947, if you will, sir, the same? A. January 15, 1947, interest of $25.45; February 21, withdrawal of $100; February 27, withdrawal of $100; July 15, interest of $26.21; the balance $2,648.19.

Q. $2,648.19? A. Yes, sir.

Q. For the calendar year 1948, sir? A. January 15, interest of $26.40; January 15, withdrawal of $2600; January 15, deposit of $100; July 15, interest of $1.74, and the balance $176.41.

Q. Now 1949, if you will? A. Interest on January 15 of $1.76; July 15, $1.78, balance, $179.95.

Q. That is the balance on December 31? A. December 31.

Q. December 31? A. December 31, 1949..

Q. For the year 1950? A. January 3, 1950, a deposit of $150; January 16, interest of $1.79; April 7, a deposit of $112.50; July 15, interest of [151] $3.87; November 29, 1950, a withdrawal of $400; balance on December 31, $48.11.

Q. $48— what? A. $48.11.

Mr. Koen: I am going to substitute a photostatic copy of the ledger card, with permission of the Court and Mr. Maguire has no objection, so the ledger card may go back. All the other documents I would like to have go in evidence.

The Court: And your objection is noted, Mr. Maguire.

Mr. Maguire: I have no objection to the substituting of the photostats.

Mr. Koen: The gentleman says this is a copy of the original, so all that went for nothing. May they be marked?

The Clerk: Government's Exhibit 11.

[Group of documents relating to Worcester Mechanics Savings Bank, Isabel C. Massei, No. 130332, marked Government's Exhibit 11.]

Mr. Koen: All right. Thank you.

Cross-examination by Mr. Maguire

X-Q. Can you tell me when this account was opened? Do you have it from your records? A. I only brought the records from 19—

X-Q. Are you giving this from memory or do you have records? A. I have a record of when the signature card was filed.

X-Q. Fine. May I have that, please? [152] A. The signature was filed March 4, 1939.

X-Q. Do you have the amount which opened the account? A. I do not, sir.

Mr. Maguire: It is agreed, if your Honor please, that the amount that opened this deposit on March 4, 1939 was the sum of $1830. That is all, Mr. Storey.

FRANK A. BROWN, Sworn

Direct Examination by Mr. Di Mento

Q. What is your name? A. Frank A. Brown.

Q. Your address? A. Worcester, Mass.

Q. What is your street address? A. 21 Lancaster Street.

Q. And your occupation? A. Head teller.

Q. Pardon me? A. Head teller.

Q. With the Worcester County Institution for Savings? A. That's right.

Q. In response to a subpoena have you brought with you certain documents and records relating to a savings account in your bank numbered 295415? A. I have.

[153] Q. In whose name is that account? A. In the name of William V. Massei and Isabel C. Massei.

Q. Would you take out all the records you have relating to that account? A. Yes, sir.

Q. Now you have two ledger cards, a signature card, and what else? A. The deposit slips relating to those

years, the withdrawal slips, and the checks drawn from the account.

Q. Referring to the ledger card first, please, would you tell us the bank balance in that account as of December 31, 1945? A. $7,074.56.

Q. And as of December 31, 1946? A. $7,208.34.

Mr. Maguire: $7,208 or $7,280?

The Witness: $7,208.34.

Q. Now the bank balance in that account as of December 31, 1947? A. $2,346.39.

Q. And the balance as of December 31, 1948? A. $92.18.

Q. And the balance as of December 31, 1949? A. $444.39.

Q. And the balance finally as of December 31, 1950? A. $15.40.

[154] Q. Now beside that ledger card you have a signature card? A. That's right, sir.

Q. Does that indicate to you the date the account was opened? A. The account was opened on March 15, 1933.

Mr. Di Mento: I offer the ledger cards relating to this account and the signature card.

The Clerk: Government's Exhibit 12.

[Ledger Cards of Worcester County Institution for Savings, No. 295415, and Signature Card, marked Government's Exhibit 12.]

Q. Have I left you with any other cards, any other records before you? A. No. Will you take photostats instead of originals?

Mr. Di Mento: Do you mind the photostats substituted for the originals?

Mr. Maguire: No.

The Court: That's correct, Mr. Maguire.

Mr. Maguire: Yes, it is, your Honor.

The Court: All right.

Q. Will you find for me the photostat of the signature card? Would you refer to a slip of paper contained among

your group of papers and tell us if that is related to the account about which we have been speaking? A. This is a withdrawal slip of a particular sort. It is for the withdrawal of a pass book loan, which is usually made for this type of loan to save dividends on an account, when someone [155] intends to make a withdrawal shortly before the dividend is cleared.

Q. When was the loan made? A. December 24, 1947.

Q. And in what amount? A. The total, including the discount, was $255.94.

Q. And the loan is a loan from the bank to the holder of the accqunt? A. That's right.

Q. In that instance who is that person? A. It was signed by William V. Massei.

The Court: The book was put up as collateral?

The Witness: That's right.

Q. Signed by whom? A. William V. Massei.

Q. And the fact that that loan is outstanding does not affect the figure representing the amount of money credited to the customer at the end of the year in that particular case? A. You mean credited in dividends?

Q. Credited as the total balance outstanding? A. No. This would be—this is drawn off the account in payment of the loan automatically by the bank on January 2d atfer the dividend.

[156] Q. So that it does not affect your figure you have given us as of December 31st— A. Of '47, no, it doesn't.

The Court: What was that figure?

The Witness: December, $2346.03.

Q. That is the amount credited to Mr. Massei on that day. However, there was a loan outstanding on that date, and the pass book represented the collateral on that loan; is that correct? A. That's right.

Q. You say that loan was paid by Mr. Massei on what date? A. That type of loan is made automatically by the

bank. Mr. Massei signed this withdrawal slip which is an authorization for the bank to collect the amount of the loan automatically after the dividend is declared; therefore, it was paid on his order by the bank on January 2, 1948.

Mr. DiMento: Thank you. I offer the documents.

Q. How do you describe them? A. Withdrawal slip; actually they are the same as any other except for a particular purpose. I have a photostat of that.

[Documents from Worcester County Savings marked Government's Exhibit 13.]

Q. Now would you take a look at the group of checks you have brought with you [handing]. Do those checks represent payments to the customer on account of withdrawals by him? A. They do. They are based on withdrawals. They are teller's checks drawn by the teller in payment of a withdrawal rather [157] than cash.

Q. And to whom are those checks made payable? A. Two checks for $500 each are payable to Isabel C. Massei, and four checks in varying amounts are payable to Reed & Company.

Q. Six checks all together? A. That is right.

Q. If you have photostats of those checks, would you get them out now? A. Yes. [Handing.]

Mr. DiMento: I am offering six checks which the witness has just described. They are checks drawn on the Worcester County Institution for Savings: one dated June 1, 1948, in the amount of $500, payable to Isabel C. Massei; one dated November 29, 1950, in the amount of $500, payable to Isabel C. Massei; one dated July 2, 1947, in the amount of $3,042.12, payable to Reed & Company; one dated December 12, 1947, in the amount of $1191.15, payable to Reed & Company; one dated April 3, 1948, in the amount of $800, payable to Reed & Company; and one dated September 11, 1950, $594.11, payable to Reed &

Company, and all duly endorsed. I am offering photostats of these checks.

[Said photostats marked Government's Exhibit 14.]

The Court: No objection to that, Mr. Maguire?

Mr. Maguire: Well, I assume I have an objection on the matter of—

The Court: Oh, yes; only to the physical photostatic [158] copies.

Mr. Maguire: That is right.

Q. Do you know who Reed & Company is? A. Reed & Company was formerly a stock broker in Worcester, now a part of Hornblower & Weeks.

Q. You mean the Boston investment outfit? A. That is right.

Mr. DiMento: Thank you very much.

Cross Examination by Mr. Maguire

X-Q. Mr. Brown—is it? A. That's right.

X-Q. Will you direct your attention to your ledger card of 1945 and tell me whether there are any deposits made in that year? A. In 1945, on May 1st there was a deposit of $2,000; on August 21, a deposit of $3,049.27; on August 21st, another deposit of $1,000; on September 5th, a deposit of $1,000. That's all.

X-Q. That is all in 1945? A. 1945.

Mr. Maguire: Thank you.

Mr. DiMento: You are excused. Thank you very much. Just a minute, sir.

Redirect Examination by Mr. DiMento

Q. Are those deposits just recited by you reflected in the balances that you have given us for the end of each of the years? [159] A. They would be reflected in the balance of December 31, 1945.

Q. Yes, of course. A. But—yes, they are reflected in that one.

Mr. DiMento: All right.

Mr. Koen: The gentleman from the People's Savings Bank.

GRANT L. CHAFFIN, Sworn

Direct Examination by Mr. Koen

Q. What is your name? A. Grant L. Chaffin.

Q. Where do you live? A. 27 Estabrook Road, Shrewsbury.

Q. By whom are you employed? A. People's Savings Bank, Worcester.

Q. In what capacity? A. Assistant bookkeeper.

Q. And in response to a summons, have you brought certain records of the corporation with reference to, or concerning Account No. 213401? A. I have.

Q. May I see them, sir? First, may I see the signature cards? A. Yes [handing].

Q. Will you give us the information contained on those signature cards in their natural sequence by dates on the bank? [160] The Court: What bank is that?

The Witness: People's Savings.

A. Account No. 213401 started on November 29, 1933 in the name of Isabel Massei, 29 Chrome Street, Worcester.

Q. '31, sir? Did you say 1931? A. 1933.

Q. All right, thank you. A. I do not have the ledger here but I assume the account was transferred.

Q. The description on that card, sir, of the occupation of Isabel Massei? A. Housewife.

Q. And the age? A. Age 22.

Q. And the birthplace? A. Worcester, Massachusetts.

Q. And the date is— A. 1933, November.

Q. November 29; is that correct? A. November 29, 1933.

Q. Now the next card in sequence. A. William V. Massei, 29 Chrome Street; police officer; birthplace, Worcester, Massachusetts; father's name, Pilade Massei; mother's maiden name, Mary.

Q. And the account number of that, sir? [161] A. Account No. 213401.

Q. Is that the same account which you have previously discussed and which this signature card covers? A. It is.

Q. All right. The next such card, sir. A. Account No. 213401—

Q. May I direct you. Is that the same account which the prior signature card covered? A. That is.

Q. Thank you. Go ahead, please. A. The date is June 23, 1938, the account was transferred to Isabel C. Massei.

Q. The address? A. 29 Chrome Street.

Q. And the occupation? A. Housewife.

Q. Is there a second address on that card? A. On January 5, 1953, it was changed to 15 Westvue Avenue, Shrewsbury, Massachusetts.

Q. All right. Is there a fourth card covering that same account? A. There is.

Q. The date on that, sir? A. September 29, 1945.

Q. In whose name? [162] A. William V. Massei.

Q. The address originally given? A. 29 Chrome Street.

Q. And the occupation? A. Police sergeant.

Q. And is there a change of address on that card? A. On January 5, 1953, it was changed to 15 Westvue Avenue, Shrewsbury, Massachusetts.

Q. Thank you, sir. Have you the ledger card also there? A. I do.

Q. Directing your attention to December 31, 1945, can you tell us the outstanding balance on that date, sir?

The Court: In what account?

The Witness: Account No. 213401.

Mr. Maguire: May we get that clear? How many accounts are there?

The Witness: One account.

Q. In fact, the only account we have been talking about is 213401; isn't that correct, sir?

The Court: Four transfers, that's what I wanted to know.

Mr. Koen: No, not four transfers.

The Witness: Three.

The Court: Three transfers. That's what I wanted to check.

[163] Mr. Koen: The same account.

The Court: It's the same account, isn't it?

The Witness: That's correct.

The Court: It was transferred, but it was all under one account.

The Witness: Yes.

The Court: Pardon the interruption. I wanted to check that.

Mr. Koen: That's all right.

Q. The outstanding balance on December 31st, 1945, in that account was what? A. $2,687.33.

Q. And as of December 31, 1946? A. $1623.97.

Q. And as of December 31, 1947? A. $1,893.41.

Q. And as of December 31, 1948? A. $427.96.

Q. And as of December 31, 1949? A. $685.66.

Q. And as of December 31, 1949? A. $685.66.

Q. And as of December 31, 1950? A. $24.42.

Q. May I see them? [164] A. Yes [handing].

Q. I show you these two documents, sir, and I ask you what those are? A. I have withdrawal slips number 213401 for $1,025, dated November 27, 1946, signed by William V. Massei.

Q. And the other document, which is that document [pointing]? A. This is teller's check No. 36211, dated

November 27, 1946, made out in the name of William V. Massei for $1,025.

Q. Will you read the endorsements on the reverse side there, sir? A. It is endorsed by William V. Massei; secondly, by Charles F. Baker.

Q. These two documents, sir, will you tell us what those are? A. A withdrawal slip on account No. 213401, dated January 2, 1948, in the amount of $1800, signed by Isabel C. Massei; a check, teller's check No. 51807, payable to Reed & Company for $1800, dated January 2, 1948.

Q. The endorsement on the reverse? A. Endorsed by Reed & Company.

Q. These two documents, sir, [handing], what are they? A. A deposit slip, Account No. 213401, dated November 29, 1950, in the amount of $1300, signed by Mrs. Isabel C. Massei; a teller's check No. 102537, payable to the order of Isabel C. Massei in the amount of $1300, endorsed by Isabel C. Massei, and dated November 29, 1950.

[165] Mr. Koen: I'm going to offer these signature cards, ledger cards, the three checks, and the withdrawal slips that the witness has testified about, sir, and ask that they be marked.

Mr. Maguire: May I look at the withdrawal slips, please, Mr. Koen—not the withdrawal slips. I mean the signature cards.

Mr. Koen: Oh, I'm sorry. I thought you had seen them [handing].

I offer them.

[Said documents from People's Savings Bank, marked Government's Exhibit 15.]

Mr. Koen: The witness, Mr. Maguire, has indicated by the original ledger cards, and I would like to have photostatic copies made of them.

Q. Can you send them down here tomorrow morning?

A. This one is just a copy. This is a copy of the microfilm. You may have that.

The Court: We can have any that we decide to keep. We are just doing this as a matter of convenience for your bank. If I decide those records are to stay here, they'll stay here. That is the rule of law. They are not subject to the convenience of any bank. What they are doing, the Government and Mr. Maguire are conforming to the rule of reason and letting you have them in return for photostatic copies. Don't have any misapprehension that is due to the ruling of the bank. It's due to the willingness [166] of the Court to allow it.

The Witness: Yes, sir.

Mr. Koen: I have a photostatic copy of that, sir, and may I offer it in substitution for the original?

Mr. Maguire: Yes.

[Said document made a part of Government's Exhibit 15.]

Mr. Maguire: No questions.

Mr. DiMento: Washington Trust Company.

DAVID ROBERTSON, Sworn

Direct Examination by Mr. DiMento

Q. What is your name, please? A. My name is David Robertson.

Q. Roberts? A. Robertson.

Q. Your address? A. Westerly, Rhode Island.

Q. Your occupation? A. I am treasurer of Washington Trust Company.

Q. And in response to a subpoena, you have brought certain records from that bank relating to Account No. 50501? A. I have.

Q. Will you tell us when that account was opened? A. That account was opened July 6th, 1950.

Q. In whose name is that account? A. In the name of Isabel C. Massei.

Q. Is there an address given? A. 59 Shore Road, Westerly.

[167] Q. And what was the balance in that account on December 31, 1950, please? A. $545.05.

Q. You say $545.05? A. That's right.

Q. Were you reading from your ledger card when you gave me that figure? A. Yes.

Q. Let me see it, please. [Handed.]

Mr. DiMento: I'm going to offer in evidence the ledger card the witness has just testified from.

[Ledger card of Washington Trust Company, Westerly, R. I., marked Government's Exhibit 16.]

The Court: Mr. DiMento, will this witness take some time?

Mr. DiMento: No, your Honor.

Mr. Koen: He comes from Rhode Island, your Honor, and that is why we put him on now.

[Discussion off the record.]

Q. Do you have any record of a safe deposit box leased to William V. or Isabel C. Massei? A. I have no record of it.

Q. Do you know whether either of those persons, or both of them, have a safe deposit box at your bank? A. According to the records in there, I will say no.

Q. Do you know whether they had any at any time? A. I couldn't say.

[168] Q. Would you be kind enough to come back tomorrow with the complete records of the safe deposit box? I am sorry, but it will be necessary. A. If there is one.

The Court: Well, you take your time, now, Mr. Robertson, and you can look in the morning and it is perfectly all right. You will have other witnesses to go on. You see, the bank won't open until later, and it is perfectly all right.

Mr. DiMento: Two o'clock is fine.

The Witness: I can't get a train before 11.

The Court: That's fine.

Mr. Di Mento: Thank you; you are excused temporarily.

The Court: I think we will pause here, it is an opportune time, and I would like to repeat what I said to you before, that to keep the trial on an even keel I would suggest you try to refrain from reading any articles in the newspapers. I outlined that this morning, and they are a source of information and a source of comfort, also, to people who like to read them, and I am happy to say I am a member of that society. I impress upon you the necessity of keeping your mind free from all prejudice or free from all bias. It is your first case. And try to remember factually what has taken place. You will have your memory refreshed later on and you always have at your disposal, please remember, the testimony, any testimony to be read to you at any time that it becomes necessary or may become [169] necessary. So please go home and forget about it. I worked until half past one this morning and when I go home, with the help of God, I am going to get a little bit of relaxation, and I hope you all do, and when you arrive home safely I hope you find your families in fine health, and God will guide you all.

Ten o'clock tomorrow morning.

[Adjournment to 10 a.m. Thursday, April 5, 1956.]

[170] FOURTH DAY.

Court Room No. 5,
Federal Building, Boston.
April 5, 1956.

The Court: Let's go along.

Mr. Koen: The Worcester Police Department. The witness who was on the stand yesterday, if your Honor will remember, was excused until two o'clock today.

The Court: That's right.

JOHN J. McKIERNAN, Sworn.

Direct Examination by Mr. Koen.

Q. What is your name, sir? A. John J. McKiernan.

Q. Where do you live? A. 111 Bowker Street, Worcester.

Q. What is your occupation? A. I am a police officer.

Q. And are you connected in any capacity with the Credit Union of the Worcester Police Department? A. Yes, sir.

Q. What is your position, sir? A. I serve as treasurer.

Q. How long have you served in that capacity? A. Approximately seven years.

Q. Have you today, in response to a summons, brought certain [171] records here? A. I have.

Q. May I see them, please? A. [Handing.]

[Mr. Koen confers with Mr. Maguire.]

Q. Will you withdraw from your set of photostats those two documents, please? You can put those that I have told you to withdraw back in your envelope; we are not interested in those, neither counsel for the defendant nor myself. A. [Complying.]

Mr. Koen: I offer these.

Mr. Maguire: No objection.

Mr. Koen: May they be marked?

[Records of Credit Union, Worcester Police Department, marked Government's Exhibit No. 17.]

Q. Will you tell us what that document is, sir? A. This is a signature card, sir.

Q. And this white card is what, sir? A. That is a share account card.

Q. And this yellow one? A. Loan account card.

Q. In addition there are five checks; is that right? A. Yes, sir.

Q. Will you give me the information which is contained on that card? [172] A. It is a joint account card, No. 18—that is the account number—and it is an application for membership in the Worcester Police Department Credit Union, in the name of William V. Massei, 29 Chrome Street; birthplace, Worcester; occupation, police lieutenant; and it is approved by myself.

Q. And the date of that, sir? A. The date on this card is wrong. The date on this card is when it was approved by myself. Evidently when the account was opened it hadn't been approved by anybody. Just a technicality.

Mr. Koen: All right. May I show this to the jury?

Mr. Maguire: May we have the correct date, Mr. Koen?

Mr. Koen: I was going to ask him that from the next document, sir.

The Court: Has it been marked?

Mr. Koen: Yes, sir.

The Court: Will you have it read into the record, Mr. United States Attorney, so the record will show what it is?

Mr. Koen: The witness has already done that.

The Court: I thought there was some change in some number.

Mr. Koen: That is going to come from the next document, sir.

The Court: All right.

[Mr. Koen hands the document to the jury.]

Q. The share account card, so-called, sir, will you give me the [173] information contained on that? By the way,

these records are kept in the ordinary and usual course of your business? A. Yes, sir.

Q. And they are under your general supervision and custody? A. At all times, yes, sir.

Q. And the entries made on there were made at or about the time reflected? A. Exactly.

Q. Tell me, sir, about the share account, so-called. A. The share account card, the first date is February 1st, 1947 and that was when the Credit Union came into existence.

Q. Then that would be the true and correct date of the opening of that account? A. That's right.

Q. Go ahead. Tell us what the card reveals as to the activity of that share account. A. February 1, 1947 there was a deposit of $100, leaving, of course, a balance of $100. The dividend declared in 1947 amounted to $3. Do you want me—

Q. The dividends, sir. A. Everything—the balance after—

Q. No, I will take care of the balance annually, at the end of the year. A. The dividend in 1948 was $4.

Q. The balance as of December 31st, 1949 was what, sir?

[174] Mr. Maguire: 1949?

Mr. Koen: Right.

A. The balance December 31 of 1949?

Q. Yes sir. A. $1,107.

[175] Q. All right. And the balance as of December 31, 1950, was what? A. $1,312.75.

Q. All right. What was the balance outstanding—I'm sorry, I missed this before. What was the balance outstanding as of December 31, 1947? A. December 31, 1947, was $103.

Q. And the balance outstanding as of December 31, 1948, was what, sir? A. $107.

Q. And the balance outstanding as of December 31, 1949? A. $1107.

Q. I think you have testified the balance outstanding as of December 31, 1950, was $1,312.75; is that correct? A. Yes, sir.

Mr. Koen: May I check this just a minute?

[A pause.]

Q. Now, sir, this document [handing] is a loan card; is that correct right there? A. Yes, sir.

Q. Directing your attention—tell us with reference to January 16, 1950. A. The card shows a loan of $600 to William V. Massei.

Q. Oh, January 16,— A. 1950?

[176] Q. January 16. A. January?

Q. You are referring to an entry under December 16th. A. January 16th, 1950, shows a loan of $300 to the holder of the account, William V. Massei.

Q. And does the card reflect whether or not that loan was paid? A. It was paid, yes, sir.

Q. And when, sir? A. On February 10, 1950.

Q. In what amount? A. $300 was paid.

Q. All right, sir. Directing your attention again October of 1950. A. October 20, 1950, shows a loan of $100.

Q. Was that paid, sir? A. Yes.

Q. When was that paid? A. $40 was paid on November 1st, 1950, and $60, the balance of the loan, was paid November 30, 1950.

Q. Now, directing your attention to December 16, 1950, sir. A. The card shows a loan of $600.

Q. Was that loan repaid—was any of that loan repaid during the balance of December, 1950? A. No.

Q. So that as of December 31, 1950, that loan of $600 was still outstanding; correct? [177] A. Yes, sir.

Q. I show you this check, sir, and I ask you, if you will, to whom is that check made payable? A. It is made payable to William V. Massei.

Q. And the date of the check? A. January 16, 1950.

Q. Signed by you? A. Yes, sir.

Q. And the amount? A. $298.

Q. Referring to your loan account, can you tell us what that check represents? A. This check represents the loan of $300 here, less the $2 interest charge that was charged on the loan.

Q. Referring to the reverse side of that check, do endorsements appear, sir? A. Yes, sir.

Q. Tell us what endorsements appear? A. It is endorsed by William V. Massei, and it is also endorsed by Mrs. Isabel C. Massei.

Mr. Koen: May I show it to the jury, sir?

The Court: Yes.

[Check handed to jury.]

Q. Directing your attention to this document, sir, will you tell us what the date of that document is, and what it represents? [178] A. October 20, 1950, and it represents the balance of the loan of $100. It is in the amount of $97.75, less $2 interest charge, plus a 25-cent contingency fund, or less $2.25.

Q. And if I understand you, that is a check that was issued by the credit Union in support of a loan of $100 on October 20? A. Yes, sir.

Q. All right; thank you. I show you this document here and ask you what that is? A. That is a check dated November 30, 1950, payable to William V. Massei, in the amount of $1100.

Q. Is that reflected in your records here, sir? A. That was a withdrawal from the share account of November 30, 1950.

The Court: From the what account?

Mr. Koen: Share account.

The Court: What does that mean?

The Witness: Your Honor,—

The Court: Would you just explain it to the jury, Mr.

Officer? What does share account mean? Don't misunderstand me. I don't know what it means myself. Probably the jury do.

The Witness: In the Credit Union we have what we call shares, and each share is worth $5; so, for every $5 in there that means a member owns one share in the Worcester Police Department Credit Union. When I said a deposit, it was a deposit for the purchase of shares, which I should have said. Now this [179] withdrawal was a withdrawal of $1100 of his shares.

The Court: You mean that was money that was really coming to him, that belonged to him?

The Witness: That was his own money, your Honor.

The Court: That was his own money.

The Witness: Yes, sir.

Q. Can you by looking at the share account card, sir, tell us how many shares William V. Massei owned prior to November 30, 1950? A. Prior to November 30, 1950?

Q. Yes, prior to the issuance of that $1100 check. Perhaps that makes it easier for you.

[180] Mr. Maguire: Hadn't you better check his arithmetic, Mr. Koen?

The Court: What is that?

Mr. Maguire: I was just asking Mr. Koen to check his arithmetic.

[Discussion off the record.]

A. He would have 265 shares.

Q. All right, sir. As of November 30, 1950 this check represents a withdrawal of 220; is that right? A. 220 would be correct.

Q. Which leaves him, after November 30, 1950, with how many shares outstanding in the Credit Union? A. 45.

Mr. Koen: Thank you.

[Discussion off the record.]

Q. I show you this document and I ask you what this

document is? A. It is a check dated December 16, 1950 in the amount of $15.25 payable to William V. Massei.

Q. What does that represent? A. That represents a withdrawal of three more of his shares from the Credit Union.

The Court: How much was that check?

Mr. Koen: $15.25, sir.

Q. Now I show you another document and I ask you what that is. A. A check dated December 16, 1950 in the amount of $600 payable [181] to William V. Massei.

Q. On what was that issued or for what purpose was that issued? A. That's for this loan here, on this loan account card, of December 16, 1950.

Q. A loan? A. Yes, sir.

Q. Is there an endorsement on the reverse side of that canceled check? A. Endorsed by William V. Massei and Isabel C. Massei.

Mr. Koen: Thank you.

The Court: Each share, I suppose, Mr. Officer, you mean that represents his interest which he can cash in?

The Witness: Yes, it is a share—just savings.

The Court: Just like you put money in the cooperative bank?

The Witness: Yes, your Honor.

The Court: Along that line.

The Witness: Yes, your Honor.

The Court: Then when you want to cash in X shares—

The Witness: You can withdraw at any time.

The Court: You can withdraw at any time and get the cash?

The Witness: Yes, sir.

The Court: As though you went into a savings bank and deposited some money and then a few weeks afterwards you decided [182] you needed $100—

The Witness: Exactly.

The Court: That money would be yours and the shares are in the same manner?

The Witness: Yes, sir.

The Court: How are they made out?

The Witness: We don't actually have any shares. That is, on paper. They are just called shares, rather than called deposits, and that way there, interest is paid on multiples of five rather than on an odd number of dollars.

The Court: But those shares represent an asset of the officer; isn't that right?

The Witness: Yes, sir.

Mr. Koen: Pardon me just a minute, sir. [Pause.]

The Court: You have no objection to those questions, Mr. Maguire?

Mr. Maguire: Nothing at all; I think it is helpful.

The Court: I just wanted the jury to know exactly what they were.

Mr. Koen: I have no further questions.

Cross-examination by Mr. Maguire.

X-Q. You know the defendant? A. Yes, sir.

X-Q. Am I correct that during the year 1950 he was retired from the police department? If you know. [183] A. I would say not. Not in 1950.

X-Q. Not in 1950. What is the purpose of this Credit Union? Isn't it basically to enable members of the police department to borrow money against their savings at very favorable rates of interest? A. Yes, sir, and for savings and for borrowing. Convenience.

X-Q. And on the savings what do you pay, roughly, 3 per cent? A. 4 per cent.

X-Q. At what can a police officer borrow, what is the rate of interest he has to pay? A. 5 per cent.

The Court: Better not advertise too strongly. It may put a lot of savings banks out of business.

The Witness: We don't compete—

The Court: You do pretty well. You are to be congratulated. That is an interesting sideline observation.

Mr. Maguire: That's all.

The Court: They operate that at a little bit of a profit, taking care of the overhead. Of course the savings bank has a lot of expenses that you don't have.

The Witness: That's right, your Honor.

The Court: And you don't have to hire anybody.

Mr. Koen: The witness, may it please the Court, Mr. Maguire, he has photostatic copies of all the documents that have been the subject of his testimony and I am wondering [184] whether we may withdraw the originals so that the photostatic copies can be substituted.

Mr. Maguire: Certainly, Mr. Koen.

[Photostatic copies submitted for the originals of Government's Exhibit No. 17.]

Mr. Koen: I have no further questions of this witness.

Mr. Di Mento: Worcester County Trust Company? [No response.]

Mr. Koen: The gentleman from Reed & Company.

ELWIN A. GUTHRIE, Sworn.

Direct Examination by Mr. Koen.

Q. What is your name, sir? A. Elwyn A. Guthrie.

Q. And where do you live, Mr. Guthrie? A. 8 Prudence Street, Worcester, Massachusetts.

Q. By whom are you employed? A. Hornblower and Weeks, formerly Reed Company.

Q. Where are they located? A. 8 Foster Street, Worcester, Massachusetts.

Q. And the nature of their business? A. Investment securities.

Q. In what capacity are you employed by Hornblower and Weeks? A. Co-manager of the Worcester office.

Q. Were you asked to bring certain records here this morning in response to a summons? [185] A. Yes, sir.

Q. Have you brought them? A. I have.

Q. May I see them, please? A. [Handing.]

[Mr. Koen hands papers to Mr. Maguire.]

Q. These records, sir, which I have just shown to counsel for the defendant, are they records that are kept in the ordinary and usual course of business? A. They are.

Q. Are they kept under your general supervision and direction? A. That is correct.

Q. Were the entries which appear thereon made at or about the time reflected on those documents? A. That is correct.

Q. Will you describe to the Court and jury, Mr. Guthrie, exactly what those documents are? A. These are personal record cards showing all purchases and sales made to our customers.

Q. And the particular customer to whom these cards apply is whom, sir? A. William V. Massei, William V. and Mrs. Isabel C. Massei, and Mrs. Isabel C. Massei.

Mr. Maguire: Your Honor please, as far as Mr. Massei's personal card is concerned, no objection. As to the joint [186] account, and certainly to the account of Mrs. Massei, I do object.

The Court: I will admit it in keeping with my ruling of yesterday, and your objection will be noted, Mr. Maguire, and it isn't necessary to object categorically to these questions. It is understood your objection runs to the whole line of questions. The records, so far as they disclose any transactions by her. Is that what you want?

Mr. Maguire: Yes. Of course we are on a new category. The banks yesterday, and now stocks.

The Court: I will instruct on that later on, its applica-

bility and how you are to weigh it. The same general principle.

Q. The account, sir, which has, as its first entry 8-1-32, in whose name does that stand? A. William V. Massei.

Q. Will you describe to the jury the activity of that account in 1932? A. In 1932, on August 1st he purchased 25 shares of General Motors.

Q. Total price and at what total cost? A. The price was 11-5/8. The cost you have on that card.

Q. Oh, sorry. [Handing.] A. The total cost, $290.63.

The Court: That was 1942?

[187] The Witness: 1932, sir. August 4, 1932, 25 General Motors purchased, total cost of $315.63; on the same day, 25 shares of General Electric purchased at a total cost of $387.50; September 7, 1932, 15 shares Paramount-Publix at a cost of $116.25.

Q. Is that the total number of purchases made by Mr. Massei during that calendar year, sir? A. That is correct, sir.

Q. Do your records reflect any sales of stock were made during 1932? A. No sales were made for that account in 1932.

Q. To the calendar years 1933, if you will, please. A. January 23rd, 1933, purchase of 100 shares Paramount-Publix at a cost of $175; January 24th, 10 shares Paramount-Publix at a cost of $17.50; March 29th, 25 shares of General Motors, $293.75; March 30th, 10 Consolidated Gas of New York, cost $435; the same date, First National Bank of Boston, $230; April 24th, 10 shares of E. I. duPont, $465; the same date, 10 shares Continental Can, $520. Total purchases.

Q. Were there any sales, sir, during that calendar year? A. During 1933, on September 21st, 10 shares Continental Can sold, amount received, $670; September 29th, 1933, 10 shares of duPont sold, amount received, $750; October 4,

1933, 25 shares of General Motors sold, amount received, $750. Total sales.

Q. Calendar year 1934 if you will, sir. [188] A. For 1934 the purchases were on May 3rd, 10 shares Consolidated Gas of New York at a cost of $343.75; the same date, 25 shares Texas Corporation purchased at a cost of $640.63; July 23rd, 50 shares of the United Gas Corporation bought, cost, $218.75; the same date, 10 shares United Corporation preferred, cost, $278.75.

Q. Does that reflect all the activity on the purchase side for that calendar year? A. That is correct.

Q. Do your records reflect any sales during that calendar year? A. Yes. Sales during 1934, on February 13, 50 shares of General Motors, amount received, $1,987.50; July 23rd, sales of 25 General Electric, amount received, $478.13; July 23rd, sold four Radio Corporation, amount received, $20.50; and also one-sixth of a share, which would amount to approximately $2. Total sales.

Q. 1935, sir? A. In 1935 purchases made, September 7th, 50 shares of Stone and Webster at a cost of $425; the same date, 50 shares of Warner Brothers Pictures at a cost of $343.75. That is the total purchases for that year.

Q. And sales, sir, for that calendar year? A. Sales for 1935, August 27, 20 shares Consolidated Gas of New York, amount received, $565; the same date, 50 shares United Corporation sold, amount received, $225; the same date, 10 shares [189] United Corporation preferred sold, amount received, $387.50. Total sales.

Q. For the calendar year 1936, sir. A. For 1936, purchases made, February 11th, 25 shares Colorado Fuel and Iron at a cost of $215.63; February 26, 25 shares of Colorado Fuel and Iron at a cost of $206.25; April 11, 50 shares of Radio Corporation, $637.50; August 10, 25 shares of Goodyear Tire and Rubber, $593.75; the same date, 50 shares of

Warner Brothers Pictures, cost, $625; and on December 31st, 50 shares North American Aviation, cost, $706.25.

Q. Sales during that year? A. Sales for 1936; February 17, 50 shares Stone and Webster, amount received, $862.50; March 9th, sales, 50 Colorado Fuel and Iron, amount received, $350; March 23rd, 10 shares First National Bank of Boston, $462.50; 25 shares Texas Corporation, $937.50; the same date, 50 shares Warner Brothers Pictures, $625.

Q. Does that represent all the sales during that calendar year, sir? A. That is correct.

Q. Directing your attention to the calendar year 1937. A. For 1937, purchases made, April 8th, 25 shares California Packing, cost, $1,003.13; October 11th, 25 General Motors, cost, $1,115.63; December 14th, 25 Yellow Truck and Coach, Class D, $253.13.

[190] Q. Does that represent all the purchases in 1937? A. That is correct.

Q. And are there any sales reflected during the calendar year 1937? A. No sales reflected during 1937.

Q. From your records, sir, were there any purchases on this account during the calendar year 1938? A. No purchases made during 1938.

Q. Were there any sales made by William V. Massei during the calendar year 1938? A. One sale, December 2d, 50/200 of California Packing preferred; amount received, $12.25. Total sales.

Q. For the calendar year 1939, do your records reflect any purchases made by William V. Massei? A. For the year 1939, May 27, a purchase of 50 shares of Briggs Manufacturing common; cost, $1,062.50. On September 7, a purchase of 100 Goodyear Tire & Rubber at a cost of $3,000. Total purchases.

Q. Were there any sales made by Massei during the year 1939? A. During 1939 sales were made. Two on March 2d: 25 California Packing, $428.13; 25 General Motors,

$1,221.88; 25 Goodyear Tire & Rubber, $846.88; 50 shares North American Aviation, $906.25; 100 Radio Corporation, $750; 50 Warner Bros. Pictures, $268.75; and 25 Yellow Truck & Coach B, $465.63. Total sales.

Q. Directing your attention to the calendar year 1940, sir, [191] were there any purchases by William V. Massei? A. For the calendar year 1940, purchases were made as follows: May 15th, 50 shares Goodyear Tire & Rubber, at a cost of $806.25; and on July 1st, 200 shares of United Corporation at a cost of $425.

Q. May I interrupt you, sir? These cost figures which you are giving us, are they net cost or gross cost? A. They are the cost before commission charges.

Q. Will you explain that for the jury, the difference between net and cross cost? A. On these personal record cards, of course we do not attempt to show the overall cost, because there wouldn't be room to put them on. This is the date of purchase, the amount purchased, the name of the security, and the price of the stock paid, exclusive of commissions. Commission charges are added to that when the statements are sent to the customer. So that in these cases the amounts would be slightly larger than that mentioned, both purchases and sales.

Q. Have the commission charges varied, the amount and type of commission charges over the years? A. Do they have a bearing?

Q. No, have they varied? A. They have recently appreciated or increased around, probably 2 per cent since 1950, I would say.

Q. You mean they have increased by 2 per cent? [192] A. Increased slightly.

Q. Can you help us as to the percentage which applied to sales and purchases during the period which you have just discussed? A. Well, the commission is determined by the number of shares purchased and the amount of—the price

the stock paid. As an illustration, say, on the 100 shares Goodyear Tire & Rubber purchased at a cost of 30, the approximate commission—

Q. Pardon me. That is the sale which you testified was made on September 7, 1939; that is the one you are using as an example; correct? A. That is correct.

Q. All right. A. The approximate cost as far as commission is concerned, would be $35.

Q. And that would be added onto the figure which you have testified to previously; is that correct? A. That is correct,—both on purchases and— It is deducted, of course, from the sales.

Q. Deducted from the sales? A. Right.

Q. Now, before I get off on that tangent, I think you had finished with purchases in 1940. Is that correct? A. That is correct.

Q. Do the cards reflect any sales by Massei in 1940? A. No sales in 1940.

[193] The Court: In all these purchases, Mr. Witness, for the years you have just given to the jury, have you any record to indicate whether or not these purchases were made by check or by cash?

The Witness: No, I am sorry. It isn't reflected here exactly how payment was made.

Q. Will you tell me, sir, whether the account was active during the year 1941, or 1942,—by that I mean, were there any purchases or sales during 1941 or 1942? A. Well, now, does this question include all accounts?

Q. No, I am just dealing with this account, sir. I am directing your attention to this account which stands in the name of William V. Massei, at this stage. A. On this single account no activity is contained during the year 1942.

Q. Now, sir, was there another account opened in 1941? A. There was.

Q. And in whose name was that, sir? A. Mrs. Isabel C. Massei.

Q. And the address that appears on that card? A. 29 Chrome Street, Worcester, Massachusetts.

Q. Does the card reflect a change of address? A. It subsequently reflects a change of address to Shrewsbury.

Q. The street, sir? A. I believe it is 15 Westvue Avenue. You have it on that card.

Q. Oh, I'm sorry. Westvue Avenue [pointing]; is that correct? [194] A. Yes, Westvue Avenue, Shrewsbury, that is correct.

Q. And the number? A. It looks like 18.

The Court: Is that the same address that was mentioned?

Mr. Koen: My bifocals say 15.

The Witness: 15.

The Court: Is that the same address as the first—

Mr. Koen: Pardon me, sir?

The Court: Is that the same address as the other?

Mr. Koen: Yes, sir.

Q. Directing your attention to the card which you have showing purchases and sales on that account, sir,—

A. Purchases on that account?

Q. Purchases. —what was the activity so far as purchases were concerned in 1941? A. In 1941, on March 4, 12 shares American Telephone was purchased at a cost of $1938.

The Court: May I interpose, Mr. Maguire? There isn't any dispute that this is the account of the wife of your client?

Mr. Maguire: No, no dispute on that at all, sir.

A. [Continued.] March 3, 1941, 10 shares Chrysler purchased at a cost of $633.75; March 31, 1941, 10 United States Steel Corporation, cost $575. Total purchases.

Q. Does the card reflect any activity so far as sales were

[195] concerned during the calendar year 1941? A. No sales during 1941.

Q. Now, for the calendar year 1942, sir, will you tell me? A. In 1942 the purchases were as follows:—

November 17, 1000 shares United Corporation, at a cost of $437.50; the same date, 100 shares United Corporation preferred, at a cost of $148.75; total purchases.

Q. Now, sir, in the year 1942, does that reflect any activity saleswise? A. No sales during that year.

Q. How about activity in 1943 and 1944? A. No activity in 1943 or 1944, either purchases—

Q. Or sales? A. —or sales.

Q. All right, sir. Now, the calendar year 1945, sir? A. For 1945, on April 23, a purchase of 20 American Tel. at a cost of $3300. Total purchases.

Q. So far as 1945 is concerned, saleswise, sir, what do the records reflect? A. The sales during 1945, on April 27, 32 shares American Telephone; amount received, $3,525. These sales are all on the same date, April 27th. 50 shares of Briggs Manufacturing; amount received, $2,037.50. 10 shares of Chrysler Corporation, $1,048.75; 1200 shares United Corporation common, amount received $2,100; 100 shares United Corporation preferred, amount [196] received $4,275; and 10 shares United States Steel Corporation, common, amount received $668.75. Total sales.

Q. Now, sir, listed among those stocks which you have just described as having been sold during the calendar year 1945 was 50 shares of Briggs Manufacturing Company. Is that correct? A. That is correct.

Q. Directing your attention, if I may, sir, to the first sale, or the first type of stock, stock sold on April 27, that is what? A. First stock sold, American Telephone & Telegraph.

Q. And is that a combination of the purchase made on March 4, 1941, and the purchase made on April 23, 1945?

Does that represent those 32 shares? A. I believe that is correct.

Q. All right, sir. The second item of stock sold on April 27 is what? A. 50 shares Briggs Manufacturing common.

Q. Now, your card does not reflect any purchase of Briggs Manufacturing common so far as the account of Isabel C. Massei is concerned. Is that correct? A. That is correct.

Q. Referring to Card #2 of William V. Massei, sir, May 27, 1939, is there an entry there of a stock? A. 50 shares Briggs Manufacturing purchased April 27, 1939.

Q. Do you know whether the stock sold, sir, on April 27, 1950, [197] 50 shares Briggs Manufacturing common, was the same 50 shares of stock which were purchased by William V. Massei on May 27, 1939?

Mr. Maguire: Do you know of your own personal knowledge?

The Witness: That I cannot say for sure because—

Mr. Maguire: That's all.

Mr. Koen: All right. That's all I'm asking.

The Court: Well, is there any number there, any stock number which would indicate whether it is or not?

The Witness: No numbers are recorded.

The Court: Is there anything—I am not going to ask you to answer this now until counsel have a chance to object—is there anything on that memorandum, which is kept in the ordinary and regular course of business, which would indicate 50 shares that were purchased by Mr. Massei on the date that Mr. Koen refers to is the same 50 shares that his wife held on the date that you have just testified to?

The Witness: No, sir, there isn't.

Mr. Koen: Will you let me put it this way, if I may, sir?

Q. Will you take, sir, the two cards representing the account of William V. Massei and the card representing the account standing in the name of Isabel C. Massei, and tell us whether the sales represented on those three cards,

as of December 31, 1945, represent any stock holdings, so far as your records are [198] concerned, in the name of William V. Massei, Isabel C. Massei, or William V. Massei and Isabel C. Massei as joint holdings? Take your time, if you please, sir. A. [After a pause.] Would you rephrase that question?

Q. Sure.

The Court: Would you kindly read it to him?

Mr. Koen: I'll rephrase it.

The Court: No, I'll have it read to the witness.

Mr. Koen: I just as soon put it to him another way, your Honor.

Q. Will you take the records of purchases on both of those accounts which are represented by those three cards and tell the jury whether the sales over a period of years cancel out the purchases which were made, having in mind the date December 31, 1945? What was the status of the account as of December 31, 1945? [199] A. The sales made during 1945—

Q. No, no. I am not confining it to 1945, sir: I'm sorry. I am talking about the entire life of both accounts. Whether as of December 31, 1945 your records reflect any holdings in the hands of either William Massei or Isabel C. Massei. A. [Examining] From a rather rapid calculation here—

The Court: Listen, don't make any rapid calculation. You take your time and examine it thoroughly. I want to get your considered, final answer. That is what this defendant is entitled to have. Haste makes waste, so you take your time. Don't be nervous.

Mr. Koen: I notice the time—

Mr. Maguire: I suggest we take a break here.

The Court: As a matter of fact, I have a grand jury. I would like to go along for about 10 minutes.

Mr. Koen: All right, sir.

The Court: I got held up this morning on a little bit of emergency matters. I don't know how I can control it.

[Brief pause.]

Mr. Maguire: I think he is ready.

A. The purchases and sales for those years seem to be in balance, and as a result—

Mr. Maguire: Did you use the words "seem to be"?

The Witness: From the records here, checking off twice, they are in balance.

[200] Mr. Maguire: And that is for how many accounts, please?

The Witness: For the account of William V. Massei and Mrs. Isabel C. Massei.

Mr. Maguire: What about the joint account, you haven't figured that?

Mr. Koen: I haven't asked him to. That doesn't start until later on.

Q. Is it fair to say, from your last statement, as of December 31, 1945 the sales and purchases of those two accounts being in balance, there were no securities held, so far as those accounts are concerned, in the name of either William V. Massei or Isabel C. Massei? A. That is correct.

Q. You say they have balanced out, sir, and that is by considering the purchases and sales on those two sets of accounts, is that correct? A. That's correct.

Q. And the sum total of those two sets of records balance out? A. That's correct.

Q. Now, going, if you will, sir, back to the account which stands in the name of William V. Massei, are there any entries there reflecting purchases made in the calendar year 1946? That would be your second card, I believe. A. 1946?

[201] Q. That's correct. A. No purchases.

Q. Any sales? A. No sales.

Q. Calendar year 1947, sir, were there any purchases? A. No purchases.

Q. Any sales? A. No sales.

Q. In 1948, sir, were there any purchases of securities on the account of William V. Massei? A. In 1948, on April 2nd, a purchase of 100 shares of New England Electric System at a cost of $1,112.50; on August 24, a purchase of 100 New England Electric System at a cost of $1,082.50.

Q. And when you use the word "cost", sir, on that transaction, is that the net cost or the gross cost? A. That is the cost before the commission charges.

The Court: What year is this, now?

Mr. Koen: 1948, sir.

Q. That is the cost or the price on the market without reference to payments of commissions and taxes involved in the transaction? A. That's correct.

Q. What rate of commission was being paid in 1948, sir, if you remember? [202] A. Well, in 1948 the approximate cost to purchase 100 New England Electric System would be about $15.

Q. And there were two such transactions in 1948? A. That is right.

Q. So that the cost that you have testified to, so far as the holder of the stock, would be increased by approximately $30? A. That is correct.

Q. On those two transactions. On that particular account was there any activity, so far as sales were concerned, in the year 1948? A. No sales during 1948.

Q. For the calendar year 1949 do your records reflect any purchases or sales? A. No purchases or sales.

Q. During the calendar year 1950, sir, do your records reflect any purchases? A. No purchases during 1950.

Q. Any sales on that account during 1950? A. No sales on that account.

Q. And the last series of questions which I have asked

of you, sir, deal with the account standing in the name of William V. Massei; correct? A. That is right.

Q. Now, as to the account standing in the name of Isabel Massei, which I have previously questioned you about, sir, up [203] to December of 1945, will you tell us whether there was any activity in that account, purchasewise for the calendar year 1946? A. Nothing during 1946.

Q. Were there any sales during the calendar year 1946 on that account? A. No sales during 1946.

Q. Were there any purchases on that account during the calendar year 1947? A. For 1947, on June 26, a purchase of 10 American Telephone at a cost of $1,573.75.

Q. Again, is that cost the net cost? A. That is the cost before the commission charged.

Q. That is what I mean by the term "net cost". I don't know what you use in investment circles. A. Net cost.

Q. Can you give us the approximate cost, commissionwise, to the stockholder on that transaction? A. The approximate cost would be $6.

Q. Were there any sales during the year 1947, calendar year? A. I hadn't completed the purchases.

Q. Oh, I beg your pardon, sir. It is on the next page.

The Court: I think the grand jury is here now, so we may take a recess—it will take 10 minutes to take this report.

[Brief recess for the case on trial.]

[204] Q. I think before the Court recessed, Mr. Guthrie, that I was dealing with the purchases of stock in 1947, and you told us about a purchase made on June 26 of 10 shares of American Tel. & Tel. Is that correct? A. I believe that is correct, sir.

Q. And at that point recessed. Now were there some other purchases in 1947 on that account? A. June 26, 1947, 100 shares New England Electric System purchased at a cost of $1,462.50.

Q. Now may I interrupt you? I'm sorry. But may I go back to that purchase of June 26, sir. You have given us a price for that 10 shares of American Tel. & Tel. That is what, sir? A. The 10 American Telephone were purchased at a cost of $1,573.75.

Q. Now can you tell us what the cost was to the customer on that particular item? A. The cost to the customer—

Q. That is right. A. —including commission, would be approximately $1,579.75.

Q. Have you the original invoice, in that, sir? A. No, I don't have the invoice on that purchase.

Q. Do you have the cost, sir, of the 100 shares of New England Electric System bought on June 26th? A. The net cost, $1,462.50.

Q. The cost to the customer, sir, have you that? [205] A. I don't have that.

Q. Have you the invoice or duplicate invoice? A. No, I don't have that.

Q. Based on the existing rates applicable at the time of that sale, can you tell us the approximate cost to the customer? A. The approximate cost to the customer would be $1475.50.

Q. $1475.50? A. Yes.

Q. The next purchase in '47, if there was one, sir? A. On November 13, 10 shares American Telephone at a net cost of $1,538.75.

Q. The cost to the customer, as near as you can approximate it? A. $1,543.75.

Q. The next purchase during that calendar year? A. December 11, 100 shares New England Electric System, net cost $1175, approximate gross cost $1190.

Q. The next such purchase? A. On December 19, 1 share First National Bank of New York, net cost $1255, gross cost approximately $1275.

Q. Now, sir, were there any sales during the calendar

year 1947 on that account? A. One sale made November 13, 10 American Telephone rights, net amount, $13.75.

Q. Is that net to the customer? A. No, there would be a small charge of approximately $1, so [206] the customer should have received about $12.75.

Q. Now, sir, will you explain what is meant by American Tel. & Tel. rights? What are those? A. The Telephone rights are issued to the stockholders in connection with the issuance of additional securities which may be exercised by the customer or sold if he doesn't care to.

Q. That is, the rights may be used to purchase additional stock, or they are saleable on the market? A. That is correct.

Q. Were these sold on the market without reference to the purchase of new stocks? A. That is correct.

Q. Were there any other sales in 1947, sir? A. No other sales from that account.

Q. All right. Now, was there any activity in that account in the year 1948? A. None in 1948.

Q. That is, neither purchases nor sales? A. That is correct.

Q. Was there any activity in 1949, purchasewise or saleswise? A. No purchases or sales during the year 1949.

Q. Coming down to the calendar year 1950, sir, was there any activity in that account? A. During 1950 there was a purchase made on July 14th of 25 shares E. I. duPont at a net cost of $1,718.75.

[207] Q. Will you tell us the approximate— A. The approximate gross cost of—see if I have that here.

Q. Do you have a figure on that, sir? A. A gross cost of $1731.67.

Q. And how was the differential between 1718 and 1731 made up? A. A commission charge of $12.50; the odd lot tax of 12 cents; shipping charge 30 cents; total charge $12.92 for the commission and taxes.

Q. Now is that the entire cost that is contained on that particular card, sir? A. That is correct.

Q. Now do you have another card? A. This one here [perusing]. We have a joint account card for William V. and Isabel C. Massei.

Q. Now, we have received no testimony as to that one; is that correct? A. I believe that is correct.

Q. What is the caption on that card, if any? A. "William V. and Mrs. Isabel C. Massei, Joint Tenants."

Q. The address? A. 29 Chrome Street, Worcester, Mass., which was later changed to 15 Westvue Avenue, Shrewsbury.

Q. Is there an account number there? A. There is an account number, but that applies to the year 1955, starting September of 1955 only.

Q. All right, sir. Is there a telephone number? [208] A. Telephone Viking 2-5481.

Q. And is there a designation of the class? A. No, they really aren't classified. This just represents the salesman who has the account.

Q. Now what is the first entry, the date of the first entry on that account, sir? A. On December 30, 1947, 300 shares New England Electric System.

Q. Purchased or sold? A. Pardon me?

Q. Purchased or sold? A. Purchased.

Q. And the price, sir? A. At a cost of $3,562.50.

Q. Have you a duplicate invoice covering that transaction? A. Yes.

Q. The total cost, if you will, sir, to the customer? A. The total cost to the customer, $3,610.59.

Q. Were there any other purchases than the one on December 30 you testified to in the year 1947? A. On December 31, 1947, 20 shares American Telephone was purchased.

Q. The cost? A. At a cost to the customer of $3,033.97.

Q. Now, sir, do your records reflect any sales during the

[209] calendar year 1947 on that account, sir? A. No sales during 1947.

Q. Directing your attention to the year 1948, are there any entries on that card reflecting purchases in that year? A. During 1948 a purchase was made on February 17th of 100 shares of New England Electric System.

Q. From your records, can you tell us the cost to the customer on that transaction? A. The cost to the customer, $1,140.90.

Q. The next such sale? A. Pardon me?

Q. The next such sale in that year? A. The next purchase was made—

Q. Pardon me, I meant purchase. A. —March 25, 1948, 25 shares United Aircraft.

Q. The cost to the customer, sir? A. The cost to the customer is $1714.35.

Q. Were there any sales during that calendar year on that account? A. No sales during 1948.

Q. Directing your attention to the calendar year 1949, were there any purchases? A. During 1949, on June 15th he purchased 25 shares of Bond Stores.

Q. The cost to the customer? [210] At a cost to the customer of $439.73.

Q. The next such purchase, sir? A. The next purchase was on June 15, 1949, 25 shares Pure Oil at a cost of $649.25; on the same date, 25 shares of Schenley Industries, at a cost of $591.34; on June 17th, 25 shares of Howard Stores, at a cost of $332.77; and, on June 20, 10 shares American Telephone at a cost of $1393.15.

Q. Does that constitute the entire purchases made for that calendar year? A. That is correct.

Q. Were there any sales during the year 1949. A. During 1949, on May 4, a sale of 40 American Telephone rights.

Q. And the net to the customer on that sale, sir? A. They

were at a cost of $51.64. On November 26, 800 New England Electric System rights were sold.

Q. And the net to the customer? [211] A. For which he received $8.44. Total sales.

Q. The next item, sir? A. The next year?

Q. Yes. A. For 1950, on September 8th, a purchase of 19 Schenley Industries, at a cost to the customer of $594.11. That represents the entire purchases.

Q. All right, sir. Sales during that calendar year, and the net to the customer. A. The sales during 1950, on September 8, one-quarter share of Schenley Industries for which he received $6.50. December 21, 25 shares Pure Oil sold, for which he received $1,172.92. And the same date, 50 Schenley Industries sold, for which he received $1,956.69.

Mr. Koen: Pardon me just a minute, your Honor.

[Brief pause.]

Q. Mr. Guthrie, will you go back to the purchase reflected on June 15th, 1955 of 25 shares of Schenley Industries common and tell me, if you will, please, the cost to the customer?

Mr. Maguire: What year, Mr. Koen?

Mr. Koen: I'm sorry. 1949.

A. The approximate cost, $601.25. On the statement here, cost to the customer, $591.34.

Mr. Koen: If your Honor will bear with me for just one moment. [Pause.] While I am waiting for that information, [212] I am not too sure whether I have made arrangements to substitute these transcripts for these originals, Mr. Maguire. Do you have any objection?

Mr. Maguire: No objection.

Mr. Koen: May I show these cards to the jury?

The Court: Oh, certainly.

Mr. Koen: They were not marked before; they were offered. These are transcripts of joint account of William V. and Isabel C. Massei with the Reed and Company, and

transcript of the account of William V. Massei with the Reed and Company, two cards, and transcript of account of Mrs. Isabel C. Massei.

[Transcripts of accounts with Reed and Company marked Government's Exhibit No. 18.]

Q. Directing your attention, sir, to the date of June 26, 1947 on the account of Mrs. Isabel C. Massei, I have asked you previously to approximate the cost to the customer and I ask you to look at this document here, sir, and ask you if you will tell us what the cost of 100 New England Electric System was. The sale, rather.

Mr. Maguire: May I inquire what the document is he is looking at?

Mr. Koen: I will show it to you, sir. I am not going to introduce it—that is a purchase, sold to Mrs. Massei. [Conferring with Mr. Maguire.] All right, Mr. Maguire?

Mr. Maguire: Yes, sir.

Q. The cost, if you will. [213] A. The cost to the customer, $1,462.50.

Q. The next on the same date, the cost to the customer of 10 shares of American Tel. & Tel. A. $1,579.62.

Q. On November 13th, 1947, 10 shares of American Tel. & Tel., the cost to the customer, if you will. A. $1,545.62.

Q. On December 11, 1947, 100 shares of New England Electric System, cost to the customer. A. $1,191.15.

Q. December 19, 1947, one share, First National Bank of New York, cost to the customer. A. $1,255.

Q. Directing your attention to the account of William V. Massei, sir, on April 2, 1948 can you tell us from this document the cost to the customer of 100 shares of New England Electric System? A. $1,128.33.

Q. And on August 24, 1948, the same account, the cost to the customer of 100 shares of New England Electric System common. A. $1,103.21.

Mr. Koen: I believe that's all. [Pause.] I have no further questions.

Cross-examination by Mr. Maguire.

X-Q. Mr. Guthrie, will you turn to Mrs. Massei's account? [214] A. Yes, sir.

X-Q. I am particularly interested in the sales of her stock on May 1st, 1945.

The Court: Mr. Maguire, would you prefer to go on with the cross-examination at quarter past two?

Mr. Maguire: Probably so, your Honor. It is one o'clock.

The Court: I don't want you to be put in any position where you would be pressured in view of the fact that the hour is close to luncheon. Have a good luncheon.

[Luncheon recess for the case on trial.]

[215] AFTERNOON SESSION.

ELWIN A. GUTHRIE, Resumed.

Cross Examination by Mr. Maguire, Continued.

X-Q. Mr. Guthrie, let me direct your attention to the account of Isabel Massei, in the year 1945. Your testimony was that on May 1, 1945, she sold a certain amount of stock. Will you list that for me? A. Well, on the date of April 27—

X-Q. I beg your pardon? A. —which is the top date, the actual date of the sale, 32 shares American Telephone, 50 shares Briggs Manufacturing,—

X-Q. Would you give the amount realized on those sales, please? A. Yes, sir. The 32 shares American Tel., $3,525; 50 shares Briggs Manufacturing, $2,037.50; 10 shares of Chrysler, $1,048.75; 1200 shares United Corporation, $2,100;

100 shares United Corporation Preferred, $4,275; and 10 shares United States Steel common, $668.75.

X-Q. Now, Mr. Guthrie, have you added that up for me, please? A. The total amount, $13,655. That is before deductions of commission charges.

X-Q. Very good.

The Court: What year was it?

Mr. Maguire: This is 1945, your Honor. April 27th.

The Witness: That's correct.

[216] X-Q. Now were there any further stock purchases the rest of that year, taking us down to December 31, 1945? A. There was only one purchase made in 1945.

X-Q. Fine. It was not subsequent to April 27th? A. No, that is correct.

X-Q. When these stocks that you listed totalling 13,000 were sold? A. That is correct.

X-Q. Now let me direct your attention to the account of William Massei, and let us go back to the year 1943.

The Court: Now may I say this to you parenthetically? As you get these figures, there is a different legal yardstick for the period before— Now if I don't say this clearly, I want you, Mr. Maguire, to correct me, and I want you, Mr. Koen, to correct me, because I know it is a delicate thing to think about. And I am not going to discuss the law on it. I am not going to do that now. But, please, I beg of you, remember this: that the period that we have before us is the period that was set forth in the indictment, which I have written down here: 1946, 1947, 1948, 1949, and 1950. That is the period starting from the first of January, 1945—doesn't it—to the 31st of December, 1945, or does it start from '46?

Mr. Koen: January 1, 1946, sir.

The Court: January 1, 1946.

The Court: Now, there is a different yardstick that [217] applies to those six years. There is a different yard-

stick, to some extent, that applies to the years before that. So that please—I only say this—I am not trying to give you anything except a factual point of view—please do not draw any conclusions of any kind from those figures. Just try to keep them in mind, and you will have them presented to you in more complete detail, I'm sure of that, then I'll explain to you what they are in my charge, and counsel would know what I am going to say in my charge before they argue.

Is that a fair statement?

Mr. Maguire: Yes, your Honor.

The Court: Is that satisfactory to the gentlemen?

Mr. Koen: It is, sir.

The Court: All right. I do that so you won't go far afield, you know, on these figures.

X-Q. Now, Mr. Guthrie, Mr. William Massei's account in the year 1943, when he sold some stock. Will you please list the sales during that year? A. On April 29, 1943, 100 shares Goodyear Tire & Rubber sold. He received $3,737.50. On the same date 50 shares of Goodyear Tire & Rubber common was sold. He received $1,362.50. Making a total of $5,100.

X-Q. Now for the rest of that year were there any purchases or sales of stock? A. There were not, sir.

X-Q. And there were no purchases or sales of stock in that [218] account in the year 1944? A. There were not, sir.

X-Q. Or for 1945, down until December 31? A. That is correct.

X-Q. Mr. Guthrie, one last question, please. Will you go back to 1932, the account of William Massei. You have a purchase of some shares of General Motors stock in that year? A. That is correct.

X-Q. What was the amount per share, Mr. Guthrie? A. On the 25 shares bought August 1st, the amount per share 11-5/8; on August 4, 25 shares at 12-5/8.

X-Q. Mr. Guthrie, how would you like to buy a few shares of General Motors at that price? A. I would just love it!

Mr. Maguire: That is all, Mr. Guthrie.

The Court: That's the difference, isn't it, Mr. Guthrie, between a Saturday afternoon quarterback and a Monday morning quarterback?

The Witness: Something like that.

The Court: Well, that's why we have—that's one of the proofs of the existence of a Supreme Being. You can't think ahead of time and pass upon matters that take place today.

[219] *Redirect Examination by Mr. Koen.*

Q. Mr. Guthrie, do you know what happened to the checks which were issued by Reed and Company in payment of the sales of these securities on or about May 1st, 1945? Record-wise? A. You mean after the checks were issued?

Q. Yes. Do you know where the originals of those checks are now, sir? A. Well, they were sent out in the ordinary course of business. Other than that I haven't any record.

Q. No; after they were cleared and returned to Reed and Company. Were they retained, do you know? When Hornblower and Weeks took over? A. Checks issued—

Mr. Maguire: If you know, Mr. Guthrie.

A. Well, all records prior to 1948 were destroyed when Reed and Company was taken over by Hornblower and Weeks.

Q. That being so, I ask you to examine these two documents.

Mr. Maguire: May I look at these, please?

Mr. Koen: Oh, I'm sorry. [Handing to Mr. Maguire.]

The Court: Photostats were made of all those checks, weren't they, in the banks?

The Witness: I believe so, sir.

Q. I ask you to examine these documents, sir, and tell me, if you will, what they are. A. Well, this is a statement

of the sale on April 29th, 1943, for [220] Mr. William V. Massei of 150 shares of Goodyear Tire and Rubber in the amount of $5,552.93.

Q. And the attachment is what? A. The attachment is a check payable to him—

Q. You mean a photostatic copy? A. A photostatic copy of the check of like amount.

Q. The endorsements on the reverse side, if you will. A. William V. Massei, Isabel C. Massei, for deposit only.

Q. Can you tell, from looking at that, in what bank that was deposited, sir? It is not clear, is it? A. It doesn't show.

Mr. Koen: Thank you.

The Court: Isn't there a stamp there? Usually the photostat shows the stamp, doesn't it?

The Witness: But it doesn't seem to.

Mr. Koen: It isn't too clear, sir. I don't know as—.

Q. Give me the setup, sir, preparationwise, on the reverse side of the check. A. Preparationwise, May 3rd, 1943, 53-1.

Q. Now turn to the face of that check, sir, and what is the bank symbol for the Worcester County Trust? A. 53-1.

Mr. Koen: This I offer.

Mr. Maguire: No objection.

[Photostatic copies of statement regarding sale on [221] April 29, 1943 for William V. Massei of 150 shares Goodyear Tire and Rubber and check of same date payable to Massei marked Government's Exhibit No. 19.]

[Discussion off the record.]

[222] Q. Sir, one reference to the transaction that occurred on the 27th of April or thereabouts, 1945, I show you this series of photostatic copies of checks and I ask you what those checks are. A. Well, the top check was issued—those are checks totaling $13,167.95.

Q. The total of the invoices? A. Do you want me to total them?

Q. Yes, please. A. [Witness computes.]

Mr. Maguire: Mr. Koen, do you need some help?

Mr. Koen: I haven't decided that yet. I haven't taken over.

Q. The total invoices, sir? A. $15,167.95.

Q. And the total of the photostatic copies of the checks? A. $15,167.95.

Q. All right. On check No. 7415, one of those in that group, is there an endorsement on the reverse side? A. "For Deposit Only, Isabel C. Ma[illegible]."

Q. And on check No. 7414, is there an endorsement? A. "For Deposit Only, Isabel C. Massei."

Q. And on check No. 7416, is there an endorsement? A. "For Deposit Only, Isabel C. Massei."

Q. And check No. 7412? [223] A. "For Deposit Only, Isabel C. Massei."

Q. And on check No. 7413? A. "For Deposit Only, Isabel C. Massei, William Massei."

Q. And check No. 7417? A. "For Deposit Only, Isabel C. Massei."

Mr. Koen: I offer this group of checks and the supporting invoices.

Mr. Maguire: My same objection. These are only Mrs. Massei's.

The Court: That is right.

The Clerk: Exhibit 20.

[Checks and invoices, Worcester County Trust Company and Reed and Company, marked Government's Exhibit No. 20.]

Mr. Koen: That's all.

Mr. Maguire: No questions.

Mr. Koen: You are excused, Mr. Guthrie.

When we suspended yesterday, may it please the Court,

Mr. Robertson from the Westerly Trust was on the stand under examination by Mr. Di Mento.

DAVID ROBERTSON, Resumed.

Direct Examination by Mr. Koen, Continued.

Q. Mr. Robertson, I think yesterday you were excused, and you were requested to bring with you today certain records with reference to a safe deposit box, is that correct? A. Yes, I was. I didn't know the answer to your question. But there was a safe deposit box in the name of William V. or Isabel [224] C. Massei. It was safe number—

Q. Will you read the rest of the caption, sir? A. "Either or the survivor".

Q. "Either or the survivor". The box number? A. 879. It was taken out July 16, 1952. I beg your pardon. This is the date. July 21, 1948.

Q. And the box number? A. 879.

Q. And the address given, sir? A. We have two addresses; 159 Shore Road, which is Westerly, Rhode Island, and 29—is that—Chrome Street, Worcester 4, Massachusetts.

Q. Yes. Now can you tell me the dates of the visits that were made to that box during—well, up to December 31, 1950? A. On July 21st in 1948 there was a visit by Isabel C. Massei; on September 10—September the 1st rather, 1948, a visit by Isabel C. Massei; on September 10 a visit by Isabel C. Massei; on November 12th—these are all 1948—a visit by Isabel C. Massei; on March 16th, 1949, a visit by Isabel C. Massei; on August the 8th, 1949,—they must have changed the clock—a visit by Isabel C. Massei; on March the 31st, 1950, a visit by Isabel C. Massei; on October the 13th, 1950, a visit by Isabel C. Massei; on November the 27th, 1950, a visit by Isabel C. Massei.

Q. Now just a minute, sir. When you say Isabel C. Massei,

is [225] there anything on this record to indicate she is the person who visited? A. This is the slip she signed.

Q. Go ahead. A. [Continuing.] When she went to the box.

Q. All right. A. Shall I go back to 1950?

Q. Yes. A. April 27th—

Mr. Maguire: Are we interested in what happened after 1950, Mr. Koen?

Mr. Koen: I am on this, yes. If you want me to I shall state the reason to the Court.

Mr. Maguire: I don't think it matters one way or the other. I was interested in saving time.

Mr. Koen: Let's proceed to the bench on that, sir. I would like to tell the Court exactly the reason I wish this evidence in.

The Court: Ordinarily as I go along in a case I indicate to you what are the legal premises upon which the evidence has been admitted, but in a case such as this I think it is better not to do it. Then I will offend nobody.

[Conference at the bench between Court and Counsel, as follows:

Mr. Koen: I wish to show that the record will [226] reveal that on November 27, 1951 this box was visited. The agents were there with Mr. Massei and with Mrs. Massei and with Mr. Massei's attorney, Mr. Garrity, when the contents of the box were checked, with the permission of both Mr. and Mrs. Massei and Mr. Garrity.

Mr. Maguire: If the reason for going beyond 1950 is simply to show that Mr. Massei was present in Westerly, Rhode Island at the safe deposit box with Mr. Hirst, I certainly have no objection to stipulating to that.

Mr. Koen: We are almost at that point now.

The Court: All right. I will admit it. You don't object?

Mr. Maguire: No.

(End of conference at the bench.)]

Mr. Koen: In view of the Court's suggestion—

Q. Will you give us the period 1951, sir? A. November 27, 1951.

Q. Was there a visit made on that date? A. There was a visit made on that date by William V. Massei.

Q. When was the box closed out, if it was closed out, sir? A. On July 21st, 1952.

Q. Can you tell us from the documents or records you have there, sir, the size of the safe deposit box covered by that? A. You mean by measurement, by inches, or cost? [227] Q. Can you tell us the cost first? A. Well, it was an eight dollar box.

Q. Give us the approximate size. A. [Continuing] Per year.

Q. And the six, the approximate size? A. Well, can I do it with my hands?

Q. Sure.

The Court: The trouble is, if you do it with your hands, this very smart fellow here, he can interpret almost anything, but—

The Witness: Actually I can't give you the measurements exactly.

The Court: Approximately.

The Witness: Approximately, well, I would say two feet by five inches by three inches.

Q. Two feet deep, three inches high and five inches wide?

Mr. Maguire: Two feet long, I think.

The Witness: Two feet long.

Mr. Koen: When it goes into the vault it is depth, isn't it?

The Witness: Two feet long.

Mr. Koen: That's all.

Cross-examination by Mr. Maguire.

X-Q. Mrs. Massei was the one who made application for opening up this box? [228] A. That is correct.

X-Q. And in checking your records from July 21st, 1948 down through 1950, which are the years in question here, the box was visited only by Mrs. Massei, according to your records? A. To 1951?

X-Q. Through 1950, if you please. A. You are right, just by Mrs. Massei.

Mr. Maguire: That's all.

Redirect Examination by Mr. Koen.

Q. Did Mr. Massei have access to the box, too? A. I beg your pardon?

Q. Did Mr. Massei have access to the box, too? A. Yes.

Re-cross-examination by Mr. Maguire.

X-Q. He never used it though during these periods, did he?

The Court: So far as he knows.

Mr. Maguire: They are his records.

A. That is true.

X-Q. If Mr. Massei visited the box, your records would indicate it, wouldn't they? A. Yes.

X-Q. So Mr. Massei never visited that box during these years through 1950? A. Through 1950.

[229] *Further Redirect Examination by Mr. Koen.*

Q. Well, sir, let me question you on that. If both, if it should happen that Mr. Massei and Mrs. Massei went to the bank for the purpose of going to the vault at the same time, the signature of one would be sufficient to let both of them in, wouldn't it? A. Yes, it would.

Further Re-cross-examination by Mr. Maguire.

X-Q. Wouldn't your records indicate they were both present? A. Not necessarily.

X-Q. Well, let's put it this way: Shouldn't they?

Mr. Koen: I object.

The Court: No. If he can answer that, I will allow it. He has a right to test the records.

A. The signature of either person gains admittance to the box.

X-Q. We are not questioning that. I am saying: If the two arrived together, wouldn't your records indicate that both were present and went into the box? A. Not necessarily, sir.

Mr. Maguire: That's all.

The Court: That means your records wouldn't indicate it because it is only necessary to have one sign, isn't that right?

The Witness: So long as one person is authorized to go to the box and signs for that entry.

[230] The Court: It doesn't make any difference who else goes along?

The Witness: I may have a box, and you are my friend, and I say, "I want to go into my box." I go. There is nothing to hinder me from taking you into the room. We don't have to record you were there.

Further Re-cross-examination by Mr. Maguire

X-Q. It isn't the practice of your bank to report that you had a guest with you? A. No, sir.

X-Q. At the time that you open your safe deposit box? A. No, sir.

Mr. Koen: May I call a witness out of order, may it please the Court?

The Court: Certainly.

[231] ALBERT L. SAUNDERS, Sworn

Direct Examination by Mr. Koen

Q. What is your name, sir? A. Albert L. Saunders.

Q. Where do you live? A. 842 Village Street, West Medway, Massachusetts.

Q. What is your profession? A. I am an attorney.

Q. How long have you been an attorney? A. 50 years.

Q. Do you know the defendant, William Massei? A. Not personally; no, sir.

Q. Have you ever had any business dealings with him or anyone representing him? A. I have.

Q. And when was that, sir? A. My dealings with him were in 1948, also 1949.

Q. Will you give to us, please, sir, the nature of the dealings that you had with him in 1948? A. In 1948, a deed was given by myself and my sister, co-owner of the property, to a piece of land on the southerly side of the Shore Road in that part of Westerly, Rhode Island, called Misquamicut, which is a vacant piece of land, a building lot.

Q. For how much did you sell that parcel of land? A. That deed ran to William V. Massei and Isabel C. Massei, husband and wife, both of Worcester. We received $1,000 for the [232] lot.

Q. The date of the deed, if you remember, sir? A. The copy which I have says September, 1948.

Mr. Maguire: Your Honor, I assume my objections as to joint ownership are noted?

The Court: That is right.

Q. Did you at a later date have some dealings with the defendant? A. We sold another lot to William V. and Isabel C. Massei in back of the first lot, the first lot being on the street, a small lot in back in August of 1949.

Q. To whom was it deeded then, sir? A. It was deeded

to William V. and Isabel C. Massei, husband and wife, and the copy is dated August, 1949.

Q. And the purchase price that you received? A. $400.

Q. From whom? A. Well, I made a memorandum. I have it in my check book. It was "Received from Massei $400."

The Court: What was that for, the $400, Mr. Saunders?

The Witness: It was a small lot in back of the first lot. The first lot was on the main road, and this is a little piece in back to increase the size of his property.

Mr. Koen: That is all.

Mr. Maguire: No questions.

The Court: That is all. Thank you.

[233] Mr. Koen: Oh, may I ask you this question, one question?

The Witness: Yes, sir.

Q. Referring to the 1948 transaction, Judge, do you have anything in your record to indicate whether that payment of the amount for the purchase of that land was consummated by a cash payment or by check? A. I haven't—the only entry I have in my check book is "William V. and Isabel C. Massei, $200 deposit," which is for the purchase of the lot, made arrangements to purchase it; and another entry on October 5, "William V. Massei and Isabel C. Massei, Balance of lot $800." But I don't know, I can't tell whether it was by check or not.

Q. I show you these two documents, sir.

Mr. Maguire: May I see these, Mr. Koen?

Mr. Koen: Yes, certainly.

Mr. Maguire: May I see you at the bench?

[Conference at the bench, during which the following is recorded:—

Mr. Koen: Apparently there is objection to asking him about these two documents.

The Court: May I see what they are? (Handed documents.)

Mr. Maguire: He asked if his records indicated whether he got paid by cash or check.

[234] Mr. Koen: He said his record does not.

Mr. Maguire: But he didn't designate it. This is presumably his sister's signature. Is he going to refresh his recollection by it?

Mr. Koen: Yes. He was co-owner with the sister.

Mr. Maguire: That is right.

The Court: What is the objection?

Mr. Maguire: The objection is that his records indicate he can't tell whether it was cash or check, and it doesn't seem to me that something like this should be brought out in direct examination, whatever the purpose is.

The Court: What difference does it make whether it is a check?

Mr. Maguire: I don't suppose it would make too much difference.

Mr. Koen: I think so. I think it does.

The Court: Well, what are you going to connect it with?

Mr. Koen: Whether there is an entry of cash in connection with the transaction.

The Court: I will admit it.

Mr. Koen: It bears on net worth.

The Court: Ask him first if that is his [235] sister's signature.

Mr. Koen: I haven't asked him a question yet. Mr. Maguire is objecting.

Mr. Maguire: May we see if it does refresh his recollection?

The Court: Oh, yes. If it is his sister's signature and she was a co-owner, I think it is admissible.]

Q. I show you these two documents and I ask you if you recognize the signature on either of these documents? A. I do.

Q. Whose signature is it? A. Carrie L. Saunders, my sister.

Q. What connection did she have with this parcel of real estate that was sold in 1948? A. She was co-owner with me. We owned the property jointly.

Q. Now, sir, those two documents are what? A. Receipts which she gave, the first one being July 20, 1948, "Received from William V. Massei, $200, first payment on Lot 479B off Shore Road;" the other is October 2, 1948, "Received from William and Isabel"—it don't say who—"$800, balance of two lots south of Shore Road, $800."

Q. Now, sir, having those two documents in your hand, can you tell us whether or not the land which was bought in 1948 was purchased by cash or by check? Does that help you in any way? [236] A. No.

Q. To refresh your recollection on that point? A. No.

Mr. Koen: All right, sir.

The Court: Let me ask you this. What was the price of the two lots?

The Witness: The front lot was $1,000 and the back lot was $400.

The Court: Was what?

The Witness: $400.

The Court: And do you recognize that as your sister's signature?

The Witness: Yes. As a matter of fact, she does most of the business down there in Westerly, where she lives.

Mr. Koen: That is all.

The Court: Do you know what those payments were correlated to?

The Witness: Oh, yes, I know they're related to the sale of this lot.

The Court: To whom? Sale of the lot to Mrs. Massei and Mr. Massei?

The Witness: Yes.

Mr. Maguire: No questions, thank you.

The Court: Thank you, Judge.

Mr. Koen: Now I have another witness from Rhode Island [237] I would like to put on so he may go back this evening.

VICTOR J. BARBONE, Sworn

Direct Examination by Mr. Koen

Q. What is your name, sir? A. Victor J. Barbone.

Q. Where do you live? A. 59 Oak Street, Westerly, Rhode Island.

Q. What is your business? A. I'm a heating and plumbing contractor.

Q. Where? A. 59 Oak Street, Westerly, Rhode Island.

Q. Do you know the defendant, William Massei? A. Yes, I do.

Q. Will you tell us whether or not you have done any business with him or for him? A. Yes, I have.

Q. Did you bring certain records with you today in response to a summons? A. Yes, I did.

Q. May I see them? A. Yes [handing].

Q. Will you tell us when you first did any business with Mr. Massei? A. It was on March 3, 1949.

Q. And where did you perform the work? [238] A. This was done at 59 Shore Road, Westerly, Rhode Island.

Q. And will you tell us the nature of the work? A. It was for a warm air heating installation.

The Court: What?

The Witness: A warm air heating installation.

Q. Will you keep your voice up, please? A. Yes.

Q. And what was the charge that you made for the

services that you rendered to Mr. Massei? A. For the heating it was $1,448.71.

Q. Was that paid, sir? A. Yes, it was.

Q. When? A. We received one payment on February 14th.

Q. What year, sir? A. 1949, for $500; and we received payment on March 7th, 1949.

Q. In what amount, sir, on March 7, 1949? A. $945.

Q. Can you from your records tell us the nature of the payment on February 14, 1949, that is to say, was it by check or by currency or cash? A. It was by cash.

Q. And can you from your records tell us the nature of the payment on March 7, 1949? A. By cash.

[239] Q. Now, in addition to two payments, was there something else? A. You mean on this particular job?

Q. Yes. A. I gave him a discount of $3.71 on that.

Q. So the net receipt by you on this deal was how much? A. $1,445.

Q. That was all by cash? A. Yes.

Mr. Koen: I think that is all.

Mr. Maguire: No questions.

Mr. Koen: All right, sir, you are excused.

ALBERT F. WADDEN, Sworn

Direct Examination by Mr. Koen

Q. What is your name? A. Albert F. Wadden.

Q. Where do you live? A. 12 Curve Street, Wellesley, Mass.

Q. By whom are you employed? A. H. P. Wood & Company.

Q. What is their business? A. Investment securities.

Q. And where are they located? A. They have an office at 75 Federal Street, here in Boston.

Q. And what is your position with the company? A. Assistant treasurer.

[240] Q. And were you summoned to bring certain records here today? A. I was.

Q. Have you those records? A. I do.

Q. Will you produce them, and may I have them? A. Yes [handing].

Q. What are those two documents, sir [handing]? A. These are what we call ledger sheets showing various accounts.

Q. And the first of those sheets, will you tell us what that is and what it represents? A. It is an account in the name of Mrs. Isabel C. Massei, 29 Chrome Street, Worcester 3, Mass. It is dated 1946, March 26th; a purchase of 50 Higgins, Incorporated, common, at $11, total cost $550.

Q. That is the cost to the customer? A. That is the cost to the customer.

Q. All right, sir. Do your records reveal whether or not those have been sold? A. No, they do not.

Q. Do your records reveal whether they have been delivered to the customer? A. No, we don't show that now. They were paid for on April 3 of that year.

Q. Thank you, sir. Now the other document, what is that? A. This is a ledger sheet for Mrs. Isabel C. Massei, 29 Chrome Street, Worcester 4, Mass. It is dated December 18, 1950. A [241] purchase of 15 Higgins, Incorporated, at $2 per share, net cost $100, and a check on the account was received for $100. It shows that the stock was delivered to Transfer, in other words, to be registered to the client's name on December 26th.

Q. Now you have given us the net cost. Can you tell us what the overall gross cost is? A. That would be the overall cost. There would be no commission charges on this.

Q. No commission charges? A. Yes.

Mr. Koen: All right, thank you. I don't have any further questions.

Mr. Maguire: No questions. Just the usual objection, your Honor.

The Court: All right.

Mr. Koen: Worcester County Trust.

BERNARD G. SUTHERLAND, Sworn

Direct Examination by Mr. Koen

Q. What is your name, sir? A. Bernard G. Sutherland.

Q. And where do you live? A. 3 Hyannis Place, Worcester 4, Mass.

Q. By whom are you employed? A. Worcester County Trust Company.

Q. In what capacity? A. Assistant Treasurer.

[242] Q. Were you asked to bring certain records here today, sir? A. I was.

Q. Have you those records? A. I do.

Q. May I see them? A. Yes [handing].

[Said records shown to Mr. Maguire.]

Q. I show you this document and I ask you what it is. A. This is a signature card for an account in the name of Isabel C. Massei.

The Court: Your rights are all saved here, you know.

Mr. Maguire: Thank you.

Q. And the type of account? A. This is a checkmaster account which goes by number. We have the number 1792 in this account.

Q. And the address? A. The address at the present time is 15 Westvue Avenue, Shrewsbury.

Q. And the date the account was opened, if you will? A. The account was opened May 3, 1943.

Q. Now, referring to your records, if you will, tell me whether or not you can inform us what the balance was in that account as of December 31, 1945? A. On December 31, 1945, it was $368.26.

Q. And can you tell us, sir, what the balance was in that account as of December 31, 1946? [243] A. 1946 it was $103.73.

Q. And as of December 31, 1947? A. $248.

Q. And December 21, 1948? A. $1103.33.

[244] Q. And the balance as of December 31, 1949? A. $2,052.04.

Q. And the balance as of December 31, 1950?

The Court: 19—what?

Mr. Koen: 1950.

A. $2,806.12.

Q. What is the account number? A. 1792.

Q. 1792. I ask you what this series of documents are? A. These are deposit slips or records of deposits made to this account No. 1792.

Mr. Koen: I offer these documents with reference to Account No. 1792.

The Clerk: Government's Exhibit 21.

[Group of documents with reference to Account No. 1792, Worcester County Trust Company, marked Government's Exhibit No. 21.]

Q. Now you have some other documents here, sir. I show you this card and ask you what this is. A. This is a card of the Safe Deposit Department, which shows the authorizations for access to Safe 1253B, in the name of Isabel C. or William V. Massei.

Q. When was that box taken out, sir, or leased? A. Originally, I believe it was leased on March 17, 1941, although this card is April 27, 1945.

Q. And will you read the information with reference to both [245] Isabel C. Massei and William V. Massei? A. Isabel C. Massei, residence: 29 Chrome Street; Business: Housewife; Birthday: 5/12/11; Complexion: Medium; Figure: Medium; Height: 5 feet 6 inches; Eyes: Hazel; Hair: Light Brown; Referred by Hazel I. Higgins,

Colonel Timothy Bigelow Chapter. Signature: William V. Massei; Business: Sergeant of Police; Birth date: July 9, 1895; Figure: Medium; Height: 5 feet 9 inches; Eyes: Brown; Hair: Brown; Referred by Chief Foley.

Q. I show you these documents, sir, and ask you what these are. A. These are access slips to the safe deposit box.

Q. Will you give us a list of the dates, sir, and the person who visited? I think this is your transcript. A. Yes. January 16, at 1:01 p.m.—this is January 16, 1946, at 1:41 p.m., Isabel C. Massei; February 18, 1946, 9:57 a.m., Isabel C. Massei; April 4, 1946, 2:53 p.m., Isabel C. Massei;—these I have just given are 1946. I believe these are changed around. I have 1945 here now.

Q. No. 1946 to November, 1949, if I may.

The Court: You don't want 1945?

Mr. Koen: No, sir.

A. In 1947, October 8, 1:40 p.m., Isabel C. Massei; June 15, 1948, 10 a.m., Isabel C. Massei.

Q. What is the date again? A. June 15, I believe it's 1948.

[246] Q. What is the notation in the upper lefthand corner of that? What does that indicate? A. I don't know what it indicates, sir.

Q. What are the initials? A. W. N.

Q. The next one, if you will? A. May 3rd, 1949, 3:01 p.m. Isabel C. Massei; April 13, 11:18 a.m—April 13, 1950, 11:18 a.m., Isabel C. Massei.

Q. Now directing your attention to the date of November 20, 1951, do you have a pass to the box on that date? A. I believe they may be in the envelope there.

Q. You are right. A. November of 1951?

Q. Yes. A. November 20th, 1951, 1:35 p.m., Isabel C. Massei.

Q. Anything else there? A. In the upper lefthand corner it says three guests.

Q. Three guests. Thank you.

Mr. Maguire: I didn't hear that last.

Mr. Koen: Three guests.

Mr. Maguire: Three guests. Who would that be, the agents?

Mr. Koen: The agents and Mr. Garrity.

Mr. Maguire: I would say it was a misnomer, if your Honor please.

[247] Mr. Koen: Well, I would say the agents and Mr. Garrity. If you want to amend it and say it was a misnomer in two respects only—

The Court: Well, what do you say?

Q. I show you this series of documents and ask you what those represent? A. These relate to a secured loan in the name of William V. and Isabel C. Massei.

Q. When was that loan made, sir? A. That loan was made March 30, 1948.

Q. You said it was a secured loan? A. Yes.

Q. What type of collateral or security was put up for the loan, sir? A. There were stocks put up for the loan. Shall I read them?

Q. If you will please. A. Forty shares of American Tel. & Tel.; 200 shares of New England Electric System—common; and three shares of First National Bank of New York.

The Court: How much was the amount of the loan?

The Witness: $5,000.

Q. The amount of the loan again, sir? A. $5,000.

Q. And the maturity date of the note or loan? A. One year, I believe, 3/30/49.

[248] Q. What was the status of the loan as of March 30, 1949? A. On March 15th it was renewed, March 15, 1949.

Q. Yes. A. It was renewed.

Q. And its maturity date as renewed? Will you give us the history from the card? A. It matured in the first place on March 30, 1949. It was renewed prior to that maturity,

March 30th, of 1950. It was renewed prior to maturity March 30th, 1951. It was renewed prior to maturity.

Q. All right. March 30, 1951, is that correct? A. That's correct.

Q. So as I understand it from the records, the loan was made on March 30, 1948, secured by these stocks, and was still outstanding and a liability of Mr. Massei on the 30th day of December or the 31st day of December, 1950, is that correct? A. The liability of William V. and Isabel C. Massei.

Q. Yes. That loan? A. Yes, that's right.

The Court: Well, it's joint and several liability isn't it?

The Witness: Yes.

The Court: That means either one or both.

Q. Does your card reflect whether or not interest was paid on that loan? [249] A. It does not reflect—it reflects the interest rate but not the amount of the interest that was paid.

Q. Is there anything in your records to indicate what happened to the proceeds of the loan in the original instance? That is the check tendered? A. There is no indication here as to what happened to that.

Q. Will you pick out for me, sir, March of 1948 on these? I direct your attention, if I may, sir, to the document which is already in evidence, the photostatic series of transcripts of the account, and this one has in the upper righthand corner the figure 19. Under the date of March 30, 1948, is there an entry there? A. There is.

Q. Will you read that entry to the jury? A. A deposit in the amount of $4,822.57.

Q. Will you describe to the jury the manner in which that is—well, strike it out. Is that amount circled with what appears to be a pencil mark? A. It is.

Q. Within that circle and beneath the sum of $4,822.57, deposit, what appears? A. The words "Loan".

Mr. Koen: That is all.

Cross-examination by Mr. Maguire

X-Q. Do you have the safe deposit records with you there? [250] A. Access?

X-Q. Yes. A. Yes.

X-Q. This box was opened, I think you said, on March 17, 1941? A. According to this card.

X-Q. That is the official record, isn't it? A. Yes. But it is not the original card.

X-Q. I understand. But that is the bank record. The box was opened on that date? A. Yes.

X-Q. Now do I understand correctly that your bank records of access go back only to February 2, 1943? A. I couldn't say that. There is a notation on this card that says all access slips—

X-Q. Who is Mr. Flynn, the vice president of your bank? A. That's right, sir.

X-Q. And under date of February 26, 1953, he wrote to me, stating that "our records only go back to January, 1943." A. That is right, sir.

X-Q. So you have no access records prior to that time? A. Possibly we don't.

X-Q. Well— A. I would assume that we don't.

X-Q. You are prepared to take Mr. Flynn's word for it, I take it. Well, now, would you be good enough to tell me, starting in [251] January of 1943, give me the access records to this safe deposit box. A. February 2, 1943, 2:49 p.m., Isabel C. Massei; March 25, 1943, 2:28 p.m., Isabel C. Massei; March 26, 1943, 11.18 a.m., Isabel C. Massei; May 3, 1943, 1:55 p.m., Isabel C. Massei; May 18, 1943, 1:41 p.m., Isabel C. Massei; June 24, 1943, 1:50 p.m., Isabel C. Massei; July 1, 1943, 10:14 p.m., Isabel C. Massei; November 20, 1943, 2:17 p.m., Isabel C. Massei; September 1, 1943, 2:15 p.m., Isabel C. Massei; October 1, 1943,

2:24 p.m., Isabel C. Massei; November 16, 1943, 2:30 p.m., Isabel C. Massei; January 7, 1944, 2:49 p.m., Isabel C. Massei; February 10, 1944, 9:52 a.m., Isabel C. Massei; February 29, 10:28 a.m., 1944, Isabel C. Massei; April 18, 2:47 p.m., 1944, Isabel C. Massei; May 5, 1:11 p.m., 1944, Isabel C. Massei; May 25, 3:26 p.m., 1944, Isabel C. Massei; June 29, 12:38 p.m., 1944, Isabel C. Massei; July 18, 2:34 p.m., 1944, Isabel C. Massei; August 2, 11:43 a.m., 1944, Isabel C. Massei; September 5, 1:51 p.m., 1944, Isabel C. Massei; October 3, 10:38 a.m., 1944, Isabel C. Massei; December 8, 1:37 p.m., 1944, Isabel C. Massei; December 26, 2:21 p.m., 1944, Isabel C. Massei.

[252] X-Q. Are those all in 1944? A. 1944.

X-Q. Will you continue, please? Anything starting in 1945? A. March 1st, 2:59 p.m., 1945, Isabel C. Massei; April 3, 2:56 p.m., 1945, Isabel C. Massei; April 16, 2:49 p.m., 1945, Isabel C. Massei; April 27, 11:10 a.m., 1945, Isabel C. Massei; May 1, 11:11 a.m., 1945, Isabel C. Massei; June 1, 2:39 p.m., 1945, Isabel C. Massei; June 21, 1945, 9:54 p.m., Isabel C. Massei; July 6, 9:02 a.m., 1945, Isabel C. Massei; August 4, 10:26 p.m., 1945, Isabel C. Massei; August 7, 10:12 a.m., 1945, Isabel C. Massei; September 5, 12:07 p.m., 1945, Isabel C. Massei; November 6, 3:08 p.m., 1945, Isabel C. Massei; December 7, 1:34 p.m., 1945, Isabel C. Massei; December 7, 1:48 p.m., 1945, Isabel C. Massei; December 13, 9:24 a.m., 1945, Isabel C. Massei.

X-Q. Will you please dig out for me this access slip of November 20, 1951, when the three guests were there? A. Yes, sir.

X-Q. And as I look at this access slip of November 20, 1951, it is noted in the upper left hand corner, "Three guests"? A. Yes.

X-Q. And that is the initials of the person in charge of the vaults?

Mr. Koen: Well, do you know?

The Witness: I don't know for sure.

X-Q. But, in any event, it is customary in your bank, when a [253] person comes in to get to his safe deposit box, and has someone with him, you make note on that slip as to who or how many people are there? A. We don't normally.

X-Q. You don't normally? A. No.

X-Q. Was that done, as far as you know, was that done at somebody's request?

The Court: If he knows.

A. I do not know, sir.

The Court: Do you recognize that handwriting?

The Witness: I don't offhand, your Honor.

Mr. Maguire: I'll only be another minute or two, your Honor.

The Court: That's all right.

X-Q. Would you turn to the opening of this checking account? I believe it was opened, you said, on May 3d, 1943.

[Mr. Maguire and Mr. Koen confer.]

Mr. Koen: I think those records are up here [indicating].

The Witness: I have a photostatic copy. May 3, 1943 is right.

X-Q. And what was the amount of the opening deposit? A. I don't believe I have it.

Mr. Maguire: That's all.

The Court: That is all?

[254] Mr. Koen: That is all.

The Court: Well, we will—have you found something?

The Witness: Do I keep these records?

Mr. Koen: Oh, no, sir, those are the property of the Court right now.

You have no objection to substituting photostats for the originals?

Mr. Maguire: No.

Mr. Koen: All right. May I explain what the witness said to the jury, sir?

The Court: Yes.

Mr. Koen [to the jury]. This, Mr. Foreman and members of the jury, is what the witness has testified to was an access card, an original record, and with permission of counsel for the defendant a photostatic reproduction of its face and reverse side will be in evidence, this being the face and this being the reverse side of the document [indicating].

Mr. Maguire: Do those include the access slips?

The Witness: Yes.

Mr. Maguire: 1943—

Mr. Koen: He has a list of the access slips. Do you?

The Witness: I do.

The Court: You prefer to have the access slips?

Mr. Maguire: I do, if your Honor please.

The Court: All right.

[255] Mr. Koen: The originals we have to keep. I will see they get back to you, sir.

The Clerk: This will be part of Exhibit 21.

The Court: Well, with the usual admonition, I don't think it will be necessary for me to repeat what I have said before, realizing it is now 5 minutes past 4. With solicitude for all of you, I bid you good afternoon, and God willing I will see you tomorrow morning at 10 o'clock. And I hope there will be no emergency matters that will interfere with my coming in here at 10 o'clock. I have no assurance of that, but I hope we will be able to get started at 10 tomorrow morning.

[Whereupon, at 4:05 p.m., the trial was recessed to Friday, April 6, 1956, at 10:00 a.m.]

[256] FIFTH DAY.

Court Room No. 5,
Federal Building, Boston.
April 6, 1956.

The Court: Good morning, Ladies and Gentlemen of the Jury. All right, Mr. Koen.

Mr. Koen: Mr. O'Leary.

JEREMIAH T. O'LEARY, Sworn.

Direct Examination by Mr. Koen.

Q. You are Jeremiah T. O'Leary, Deputy Chief of the Worcester Police Department; is that correct? A. Yes sir.

Q. Where do you live, sir? A. 416 Mower Street in Worcester.

Q. How long have you been deputy chief, sir? A. I have been deputy chief since December the 30th, 1949.

Q. And Chief Finneran was served with a subpena to bring records here this morning; is that correct? A. Yes, sir.

Q. And he is, and has been, unable to attend? A. The Chief has been suffering from a heart attack, yes, sir.

Q. Before I go into the matter of police activity, do you know the defendant William V. Massei? A. Yes, I do.

Q. Directing your attention, sir, to 1946, did you and he enter [257] into the purchase of some real estate together? A. We did.

Q. Where was that real estate located? A. That real estate is located on Belmont Road, West Harwich, Massachusetts.

Q. Do you remember the purchase price of that parcel of land or piece of land? A. I haven't the bill of sale but as I recall, the purchase price was $2,200.

The Court: Beg your pardon. May I have that last answer?

[The answer is read.]

The Court: Purchase price of what?

Mr. Koen: A parcel of land, your Honor.

Q. Do you know where the original agreement is, sir? A. The last I saw of it, I turned it over to Mr. Hatchfield, an attorney in Brockton, Massachusetts, who land courted the land for me.

Q. I show you this photostatic copy of a document and I ask you, if you will, to examine it. A. [Examining.]

Mr. Maguire: Mr. Koen, I have no objection if you say that is the copy.

Q. Directing your attention to that portion—

The Court: I think Mr. Maguire agrees—you don't [258] need any preliminary proof or examination that it is a copy. Have you seen it?

Mr. Maguire: No. Mr. Koen states it—

Q. May I borrow it? A. [Handing.]

Q. Directing your attention to the first page of this document, sir, I ask you if that refreshes your memory as to the purchase price paid by you and the defendant for this parcel of land? A. Yes, sir, it does.

Q. And what was the purchase price? A. $2,250.

Q. And of the total purchase price of $2,250, sir, how much did you pay? A. I paid one-half of it.

Q. Who paid the other half? A. Mr. Massei paid the other half.

Q. And your share would be worth what? A. $1,125.

Q. And Mr. Massei paid, also, $1,125? A. Yes, sir.

The Court: What is the date, Mr. Koen?

Mr. Koen: The date of this agreement, sir, is October 11, 1946.

The Court: Where was the parcel of land?

[259] The Witness: That is on Belmont Road, West Harwich, halfway between Route 28 and—

The Court: Down on the Cape?

The Witness: Yes, sir.

The Court: That is the road that leads to the Belmont Hotel.

The Witness: Yes, sir. About halfway between Route 28 and the Belmont Hotel. It is towards Route 28 from Old Colony Road. It is exactly five-tenths of a mile from the property to the seashore.

[260] Q. Now, sir, I show you this document which has already been shown to Mr. Maguire, and I ask you to identify that document. A. Yes, sir. This is the agreement that we reached with the Bakers.

Q. Take another look, sir, and see if you are correct. Isn't that the deed? A. That is the deed. Yes, that is the deed given to us.

Q. And the date of the deed? A. The date of the deed here is November 20, 1946.

Mr. Koen: I offer these two documents.

[Agreement and deed covering sale of land in West Harwich, Mass., to O'Leary and Massei, marked Government's Exhibit 22-A and 22-B, respectively.]

Mr. Koen: This, Mr. Foreman and members of the jury, is a photostatic copy of an agreement concerning real estate between the heirs of Benjamin F. Baker and Jeremiah T. O'Leary, which was consummated by a deed from the Bakers to Jeremiah T. O'Leary and William V. Massei as joint tenants. The deed was executed the 20th of November, 1946, and recorded with Barnstable County Registry of Deeds on November 29, 1946, and the purchase price as recited in the agreement was $2,250.

Q. Now, sir, from information which has been furnished to you by Chief Finneran, sir, can you tell us when William V. Massei became a member of or was appointed to the Worcester Police Department? A. He was appointed patrolman on January 2, 1923.

[261] Q. And his assignment at that time? A. He was assigned as night patrolman on foot.

Q. Can you help us as to what section of the city? A. We cannot, sir.

Q. Now how long did he remain on night duty, sir? A. He remained on night duty until June 1st, 1923.

Q. What happened in that time? A. On June 1st, 1923, he was assigned to the Liquor Squad, Vice Squad and Liquor Squad. At that time it was mostly the Liquor Squad.

The Court: It was the Vice Squad, too, wasn't it?

The Witness: Yes.

The Court: All right. So it is the Vice and Liquor Squad?

The Witness: Yes.

Q. And the type of duty, sir? Was he a uniformed officer? A. He was a plainclothes officer. Being a new officer, he was assigned with some of the older members of the Vice Squad.

Q. And when next did his assignment change? A. He was next assigned on February 15, 1924, to Precinct 1, night duty as a motorcycle officer.

Q. And in what section of Worcester is Precinct 1, or was Precinct 1 at that time? A. Precinct 1 takes in the main business section of Worcester, what we call the West Side of Worcester clear to the Paxton and [262] Worcester lines, takes in the East Side of Worcester to the Shrewsbury line.

Q. Speaking of Shrewsbury, sir, is Shrewsbury Street within the confines of Precinct 1? A. It is.

Q. By the way, what is the population of the City of Worcester? A. The last figure I knew was 203,000.

Q. And as of what date was that, sir? A. That was the last Federal census, I would say about four years ago.

Q. Four years ago? A. The last census we didn't get an accurate report, there was some controversy about it

two years ago on the census report; so the actual figure—

Q. It was a local problem— A. The actual figure we never got. That's what I'm getting at.

Q. All right. Prior to that census, whether it be correct or not, what was the official census prior to that time, say, about 1940? A. That's the one I'm talking about, the 203,000.

Q. So that since 1940, as I understand it, there have been at least 203,000 residents in Worcester; is that right? A. As near as I can remember.

Q. How long did he remain at Precinct 1 on night duty after February 15, 1924? A. He remained on night duty there until December 4, 1931.

[263] Q. Can you help us as to what type of duty he performed from February 15, 1924, to December 4, 1931? A. He was assigned as a night motorcycle officer, mostly to what we call the Lake district. That was the part of Worcester that his route started at Atchison Street, the corner of Atchison and Belmont, proceeded down Belmont Street to Lake Avenue, over Lake Avenue to Lake Park in a southerly direction, and then in a northerly direction to Lincoln Street, proceeded down Lincoln Street to Plantation Street, to Belmont Street

[264] Q. You have mentioned December 4, 1931, sir. Did something happen on that date? A. On the night of December 4, 1931 Officer Massei was involved in an accident with his motorcycle and a car.

Q. And when did he return to duty following that accident? A. He returned to duty on April 20, 1932.

The Court: When did the accident happen, Chief?

The Witness: The accident happened December 4, 1931.

The Court: He was out about a year and a half—

The Witness: No, your Honor, about four months.

The Court: I thought you said 1933.

The Witness: 1932.

Q. When he returned to duty on April 20, 1932, to what type of duty was he assigned? A. He was assigned to plain clothes duty.

Q. To any particular squad? A. Well, I would believe it would be—

Mr. Maguire: Wait, if you please.

A. [Continued] I don't know.

Q. Wasn't he assigned to the headquarters squad? A. I don't know.

Mr. Maguire: Just a minute, if your Honor please. He said he didn't know.

The Court: Have you any record that would enable the jury to know what it was?

[265] The Witness: No, we haven't any other record, your Honor. The record was taken just as it is from the file and all it says there is plain clothes.

The Court: Isn't there a log that you keep at the station—

Mr. Koen: Wait a minute, your Honor.

Q. Will you read, please, sir, that line (indicating)?

Mr. Maguire: May I look to see what he is reading from?

The Court: I will withdraw my question.

A. I—

Mr. Maguire: Just a minute, Chief, please.

The Court: He can use anything to refresh his recollection, whether it is written by him or not. If that does refresh your recollection, Chief, then you can testify. If it doesn't, you can't.

The Witness: I read this—

Mr. Maguire: If your Honor please, I think he is testifying from the official records of the police department.

The Court: Does that refresh your recollection?

The Witness: Yes, your Honor.

Mr. Maguire: I think he is testifying from the official

records of the police department. May I suggest he confine his testimony to just what those records are?

The Court: If there is anything in that—any memorandum I have on my desk, even written by Mr. Walsh or [266] somebody else, which would refresh my recollection in connection with some case that I heard, I may use. If it does, in fact, refresh my recollection, I think you will agree I may speak about it. The same principle, in layman's language, applies to a witness, doesn't it?

Mr. Maguire: I agree, your Honor.

The Court: I asked him if it refreshed his recollection and he said yes. Whether written by him or anybody else, it is all right.

Mr. Maguire: I have no quarrel except that I ask he confine his remarks to the police records before him.

The Court: If he has anything in that record that refreshes his recollection in connection with any other circumstances, he has a right to use that.

Mr. Maguire: I didn't understand Mr. Koen was trying to get that information.

The Court: I don't know what he is trying to get. I started out from scratch with the jury and I haven't any idea what it is. That is the way I want it. Go ahead.

Q. To what duty was the defendant Massei assigned on his return to duty on April 20, 1932, Chief? A. He was assigned to the headquarters squad, plain clothes.

Q. Were you a member of the police force at that time? A. I was, sir.

Q. What were the duties of the headquarters squad at that time, [267] if you know? A. Headquarters squad was the same squad as the vice squad and the liquor squad.

Q. The duties, if you will, please. A. The duties of the headquarters squad and vice squad were to suppress all forms of vice.

Q. Is that all? Thank you. How long did he remain on

the headquarters or vice squad at that time? A. He remained there until March the 1st, 1933.

Q. Was he transferred then? A. He was transferred to Precinct 1 on night duty.

Q. When next was there a transfer of any duty? A. On January 15th, 1934 he was again transferred to the headquarters squad, plain clothes.

Q. How long did he remain on the headquarters squad? A. He remained there until January the 20th, 1936.

Q. What happened then? A. He was again assigned to Precinct 1 night duty.

Q. Give us the next transfer, if you will. A. He was then—on January 10th, 1938 he was transferred to headquarters squad, plain clothes.

Q. Were the duties of the headquarters squad at that time the same as you have previously testified? A. Yes, sir.

Q. To suppress vice of every sort and form? And the type of [268] duty he was performing, was it uniform duty or plain clothes? A. That was plain clothes duty.

Q. All right, sir. A. On September 11, 1939 he was made a sergeant. He was assigned to Precinct 1 night duty. That was in uniform.

Q. Go ahead, sir. A. January 6, 1940 he was assigned to the headquarters squad in plain clothes and made the head of it.

Q. What was that last, sir? A. He was made the head of the headquarters squad.

The Court: When was that?

The Witness: That was on January 6, 1940.

Q. And the duties of the headquarters squad at that time, sir, were they the same as you have told us before? A. Yes, sir.

Q. How long did he remain head of the vice squad or headquarters squad? A. He was appointed January 6,

1940 and on June 1st, 1943 he was relieved of that assignment and assigned to personnel.

Q. How long did he remain with personnel? A. He remained with personnel from June 1st, 1943 to June 1st, 1947.

Q. If I may go back for a minute, sir, to the personnel situation, what were the duties of the personnel—was he personnel officer for the department? [269] A. Yes.

Q. What were the duties of the personnel officer? A. The personnel officer's duties are an inspector's duties. To inspect the physical plant and the personnel of the police department to see that the men on the street in uniform carry out their assignments.

Q. How long did he remain in that position? A. He remained in that position until June 1st, 1947. Then he was assigned to the license board. That is, investigator for the license board.

Q. Will you describe in more detail the duties that are involved in investigating for the license board, please? A. The license board in Worcester licenses the hackney carriages, the taxi drivers, the gas stations and parking lots. The man who is assigned to them investigates the applications for the license board and turns in his report on whatever conditions he finds.

Q. And during that period the man who was responsible for those investigations was whom? A. Lieutenant Massei, or Sergeant Massei at that time.

Q. Sergeant Massei at that time? A. Yes, sir.

Q. As investigator for the license board, have you told us all the duties that they perform? A. As near as I can recall, sir, yes.

[270] Q. Well, sir, can you tell us whether or not investigations would be made by one assigned to the license board in connection with taverns or liquor stores or liquor interests? A. No, sir.

Q. They would not? A. They would not.

Q. All right. Did something happen on September 8, 1947? A. On September 8, 1947 Sergeant Massei was made a lieutenant, and he continued his assignment with the license board.

Q. How long did he continue in that position, sir? A. He continued in that position to October 1st, 1949 when he was transferred back again to his assignment as personnel inspector.

Q. And the duties were the same as you have outlined before, sir? A. Yes, sir.

Q. Except that he is now a lieutenant? A. He is a lieutenant.

Q. Do you know when Lieutenant Massei ceased to be a member of the Worcester Police Department? A. On December 31, 1951 Chief Finneran was notified that Lieutenant Massei had been pensioned effective as of December 30, 1951.

The Court: What chief?

The Witness: Chief William P. Finneran.

The Court: He is the chief now?

[271] The Witness: Yes, sir, he is.

The Court: He was pensioned in 1951?

The Witness: 1951, December 30th.

[Mr. Koen confers with Mr. Maguire.]

Q. Directing your attention, if I may, sir, to the date of June 1, 1943. A. Yes, sir.

Q. Prior to that time I think you testified that Sergeant Massei was the head of the headquarters or vice squad? A. Yes, sir.

Q. And on that date, June 1, 1943 you testified he was assigned to personnel? A. Yes, sir.

Q. Do you, sir, of your own knowledge know why the transfer was made at that time? A. No, sir, I do not.

Mr. Koen: All right.

The Court: Did you ever talk to him in connection with a transfer?

The Witness: No, I didn't, your Honor. At that time I was only a lieutenant myself.

Q. Is Shrewsbury Street in Worcester, sir? A. Yes, sir.

Q. Is that the main street in Worcester; that is, is it the continuation of the main road from Boston through Worcester or [272] was it, in those days? A. It is the continuation.

Q. It was then and it is now?

The Court: That is the artery that goes by Lake Quinsigamond?

The Witness: It is Belmont Street then and Belmont Street goes right and Shrewsbury Street goes left.

Q. So that there will be no question, Chief, apparently counsel for the defendant didn't catch it, on the purchase of land by you and Massei in West Harwich, you stated the purchase price was $2,250? A. Yes, sir.

Q. Is it fair to say, using my words, that the purchase price was split down the middle, $1,125 paid by you and $1,125 paid by Massei? A. Yes, sir.

Cross-examination by Mr. Maguire.

X-Q. Chief, you have been testifying from the record as prepared by Chief Finneran that you brought down as to the various assignments Lieutenant Massei had through the years of service in the police department. There is a last line on that letter which refers to the man's record. Will you please read that to the Court and jury? A. Record of—

Mr. Koen: Wait a minute, please. I object. I object.

[273] Mr. Maguire: I would think, if your Honor please, the jury would be most interested in knowing what the man's record is.

The Court: It is a record kept in the ordinary course of business. That is what this is.

Mr. Koen: I beg your pardon, sir?

The Court: It doesn't mean the whole record usually is admissible. For example, records of a hospital that are kept in the regular and ordinary course of business are admissible but when a jury takes an accident case, they don't have the whole hospital record sent to them because there are many notes made, so-called bedside notes by nurses, that are apt to be prejudicial and consequently there is a definite rule and no one ever objects to it, I usually leave it to lawyers to pick out what should go and what shouldn't. The same rule applies to this. I don't know what this is. Will counsel come up—

Mr. Maguire: I think perhaps if I may ask one or two more preliminary questions.

X-Q. Does not the regular police record put alongside of each particular officer his efficiency rating? A. We keep a card system on the men. We have a card file.

X-Q. So that everybody in the Worcester Police Department has what you might term an efficiency rating? A. Yes. More or less.

Mr. Maguire: That is what I am asking for, your Honor. [274] I think the jury would like to know.

Mr. Koen: I don't know if that is what that is.

The Court: I don't know whether they would like to know. It isn't what the jury would like to know and what I would like to know; it is what the law says I can permit them to know or permit myself to know. If I do know it, I can't allow it to interfere with any predelictions I have with regard to anybody. What we are trying out here is a tax evasion case predicated upon the net worth theory, which very frankly is a complicated theory but which I will do my best, if the time comes, to unfold for the jury.

Mr. Koen: I will withdraw my objection.

X-Q. Would you please read into the record that magic word, Chief? A. "Record of William V. Massei: Excellent."

X-Q. Now, Chief, you have been on the force for how long? A. Thirty-two years and some months.

X-Q. And how are you police officers paid in Worcester, by check or by cash? A. We are paid in cash.

X-Q. And as a sergeant or lieutenant how often are you paid. Every week or every month? A. You want now or what it used to be?

X-Q. Either way. A. Well, three or four years ago all officials in the [275] department from Sergeant up were paid monthly.

X-Q. How long have you known Lieutenant Massei, Chief? A. Thirty-two years.

X-Q. Is he a friend of yours? A. Very good.

Mr. Maguire: That's all.

Redirect Examination by Mr. Koen.

Q. Well, sir, now, directing your attention back to the date of June 1, 1943— A. Yes, sir.

Q. —wasn't that the time, sir, that there was a general shakeup in the police circles in the City of Worcester; yes or no.

Mr. Maguire: If your Honor please, I object.

The Court: I will permit it.

Mr. Maguire: Will your Honor hear me?

The Court: No, but you have opened it up and I am going to let the United States Attorney—

Mr. Maguire: If Mr. Koen is prepared to tie this in to Lieutenant Massei, well and good, but a general shakeup of the police force, if your Honor please—

Mr. Koen: Let's proceed to the bench and I will expound my views.

The Court: They get along very well.

[276] [Conference at the bench, during which the following is recorded:

Mr. Koen: I objected originally to the introduction

in the statement of the tail end of it because it was something which ought not go in. I withdrew my objection. I have asked this man a question as to whether or not there was a general shakeup on the 1st of June, 1943. I have never asked this man the question before, but I think, as he was a member of the police department at that time, he would state as to the situation in Worcester that there was a general shakeup in the police department at that time and during that time following a series of raids in the City of Worcester conducted by the then Attorney General of the Commonwealth, Robert Bushnell, and I think we ought to have it because it involves the period of time this defendant was the head of the Vice Squad.

The Court: I don't want to go into that too far because I am somewhat familiar with it because of what occurred in the Iaconi case, and I can understand, for example, I am going to get into an orbit of a disclosure which would be very dangerous because at that time I have a very clear memory of [277] testimony that was given in the Iaconi case because it was given by the head Probation Officer of the Worcester County Superior Court who was then a State Police officer, not out of the office of the District Attorney of Worcester County, and that they did, what Bushnell did—and I may say in passing that I have a profound respect for him. He was a peculiar fellow but he was a man free from prejudice and he was thoroughly honest. He bi-passed—I think he was a decent man who took the witness stand here, and he had a little bit of resentment—he bi-passed the District Attorney of Worcester County at that time, whom I knew. That was the late Owen Hoban. They made these arrests and one of them was Iaconi. Now, if we get into this

situation, I am going to let you ask that one question, but that is all.

Mr. Maguire: Your Honor, first of all, this isn't the years of the indictment.

The Court: No, I think I will allow a question as to a general shakeup, but I don't think I will permit you to go into any detail. The record that he had speaks for itself, but I will not permit a search into any detail. I think it isn't admissible and I would be guilty of reversible [278] error if I did.

Mr. Koen: It is all part of the picture which we hope to paint.

The Court: Let me say this to you. If you observed, I frankly confess for the last four days I wasn't feeling myself, but I was in here doing whatever I could. But there is a very, very strict admonition imposed upon a judge that sits in the District Court in connection with their obligation to scrutinize carefully evidence bearing on the question of a conviction and the probability of a conviction predicated upon the net worth theory, because I know all through that Holland case is the admonition to judges to be careful to see to it because of those who travel along the highway of corruption.

Mr. Maguire: That is what you may get into here.

The Court: I know. That is only one side. On the other side that protects the evidence and surrounding conditions upon which the case may go to the jury. As you read these cases—what was the name of that fellow in New Jersey?

Mr. Maguire: Adonis.

The Court: As you read all these cases, [279] as you go back to its inception, these cases are fellows which suggest the idea that these fellows were fellows that did not meet their obligations, and while it might

well be claimed they were able to get a lot of corrupt money, on the other hand their mode of living while they were living in those days was such as to indicate that they didn't live up to it in contradistinction to the period in the indictment itself. In other words, you can't escape the idea that there remains the possibility the jury is apt to say well, that fellow was a crooked fellow, he violated every fiduciary relationship and he did violence to the administration of justice and helped to destroy the sanctity of family life and he hid behind the dark corridor of predatory vice. Now I don't want to go into those raids. I will tell you very frankly it was a most sordid picture in the Iaconi case. I don't hesitate to tell you that. It all became relevant in the Iaconi case and there was no objection to it, and it was inescapably clear the jury could have found in the Iaconi case they were justified in doing what they did do. And at that time I got the reaction that Worcester was the Sodom and Gomorrah of this part of the country, and when I drew the Iaconi case, I offered to withdraw because [280] of statements I had made in connection with Worcester conditions which had been brought to my attention in the course of my work here, and Mr. Garrity, counsel for defendant, said he would not object, and he didn't, and I tried the case. And that was the reaction of the United States Attorney.

I will allow you, Mr. Koen, in view of the situation here, to go ahead. I will allow Mr. Koen to show there was a general transfer.

Mr. Koen: General shakeup in the Police Department.

The Court: General shakeup, that's right.

Mr. Koen: At that time.

The Court: And I won't go beyond that.

[Further discussion off the record.]

The Court: The objection of Mr. Maguire is noted to this question which Mr. Koen is to ask. If it becomes necessary, Mr. Koen may ask one or two questions more to make it clearer, but the end result is what I said. I will save your exception.

Mr. Maguire: If he goes into any other question, I will have to object again.

The Court: Oh, no. I have confidence in him, and I have confidence in you, and I know you won't go beyond the ruling.

Mr. Maguire: It is just the one question.]

[281] Q. Directing your attention to the date of June 1st, 1943, was there at that time within the Police Department of the City of Worcester a general and complete shakeup of personnel in the area of officers as distinguished from patrolmen? A. Do I have to answer that yes or no?

Q. Yes, sir, you have to answer it yes or no. A. No.

Q. No? All right. Were there some transfers made on that date? A. Yes, there were.

Mr. Maguire: If your Honor please,—

The Court: No, I'll permit this, provided the transfers are correlated to any department, to any division which affected the defendant, and I'm only going to allow that and not the reasons. I do that because he said it was excellent, and whatever the transfers were it's well, they know—you have a right to argue it's within the orbit of the Chief's discretion to make general transfers.

Mr. Maguire: He was not then the Chief, if your Honor please.

The Court: No, I mean the Chief of the force. The Chief is dead. Is the Chief dead?

The Witness: Yes.

The Court: Chief Foley, wasn't it?

The Witness: No, he isn't dead, he is still alive but he has retired.

[282] The Court: He has retired. Well, I'm glad he is. I'm very happy to know that he is. But he was the Chief at the time, was he?

The Witness: Yes, sir.

The Court: It's within the orbit of the Chief as the chief executive, he's in charge of the executive branch of a department of the City of Worcester. He's the Chief of Police and it's his right whenever he sees fit to transfer officers.

Mr. Maguire: If your Honor please, he has already testified he does not know why Lieutenant Massei was transferred.

The Court: I don't intend to let him testify he was transferred. I don't intend to do that, Mr. Maguire. You have my assurance. He is not going to give reasons. He said, "Do you want me to answer it yes or no?" Mr. Koen is going to ask him some other question. Let's see what it is. Or have you already asked it?

Mr. Koen: I have asked it, sir.

The Court [to reporter]: Will you read it.

[The following is read:]

"Q. Were there some transfers made on that date?
A. Yes, there were."

Mr. Koen: The next question was, How many were there? Wasn't that the next question? Well, let me put it.

Q. How many transfers were made within the department on that day of superior officers?

Mr. Maguire: If you know, Chief.

Q. From your own knowledge. [283] A. All I can say is there were many transfers.

Q. Many transfers? A. Yes.

Q. And we are now talking about officers as distinguished

from patrolmen; right? A. Oh, no, no. I thought you meant police officers.

Q. Well, there were many police officers transferred? A. Yes.

Q. And were there many superior officers transferred on that date? A. I really don't know.

The Court: Have you any records there that you can count?

The Witness: No, your Honor, I haven't.

Q. Can you tell us, sir, how many squads were in existence in the Police Department on the 1st day of June, 1943? A. As I recall them, there was the Headquarters Squad, and there was the squad assigned to the License Commission. They are the men who investigate liquor places.

Q. I beg your pardon, sir? A. The Liquor Squad, License Commission Squad, they investigate the liquor places. That is a separate squad anyway.

The Court: He said there was the Headquarters Squad and the Liquor Squad. Isn't that right?

The Witness: Yes, sir.

The Court: And he has already told the jury what the [284] Headquarters Squad was.

Q. Now, were there any other special squads on that date? A. Not that I recall.

Q. There was the Headquarters Squad, the Liquor Squad. Was there a personnel group? A. The personnel is usually one man.

Q. I see. Was there a personnel officer before that? A. Yes.

Q. And what other special assignments of squads were there? There was one assigned to the License Board? A. Yes, one is assigned to the License Board, and one is assigned to lodging houses.

Q. Now, do you know whether or not—I think you have

testified that Sergeant Massei was transferred from the Headquarters Squad? A. Yes, sir.

Q. Then he went from there to personnel? A. Yes, sir.

Q. So the man assigned to Personnel was transferred on that day, wasn't he? If you know. A. That was in '43?

Q. Yes, sir. A. He most have been; yes, sir.

Q. Do you know whether or not the man who was in charge of the Liquor Squad on June 1st, 1943, was transferred or reassigned?

Mr. Maguire: Aren't we getting pretty far afield?

[285] The Court: No, because the Deputy Chief has got some records here and he looked down and read some and said he must have been. If he said he must have been, he must have read something. Didn't you read something that indicated that? No, just yes or no.

The Witness: No, your Honor. I just took it for granted when one man is assigned, usually someone else is assigned in his place.

Q. If a man is assigned from Headquarters Squad to Personnel, the man in charge of Personnel must of necessity be transferred; right? A. Yes.

The Court: That is because you have already told the jury there was only one man in charge of personnel?

The Witness: Yes.

Q. All right, sir. Now, of your own knowledge do you know whether the man who was in charge of the Liquor Squad at that time was transferred, and I'm talking about the 1943 date? A. No, sir.

The Court: Is there something to indicate that someone else was put in charge of it?

The Witness: No, there isn't.

Q. Was the man who was assigned to the License Board on that date in 1943 transferred, sir? A. I don't know.

The Court: Is there anything there which would enable [286] you in the light of your experience during the course

of your long career— How long have you been in the Police Department?

The Witness: 32 years.

The Court: Is there anything there, in the light of your knowledge and experience in police affairs which would lead you to know from an examination of the record before you whether or not that's so?

The Witness: Well, I can't recall who was put on the job at that time, your Honor, or whether there was.

The Court: Well, he doesn't ask you who it was.

The Witness: I just take it for granted when one man is transferred there was somebody else put in his place.

The Court: Well, now, is there anything there which would indicate there was someone in charge of the License Bureau, whatever they call it?

The Witness: No, there is nothing here to indicate.

The Court: Is there a new person put in charge?

The Witness: No. This is just the Lieutenant's record.

Mr. Maguire: If your Honor please, the only record he has pertains to Lieutenant Massei, nothing else.

The Witness: Nothing else. I don't have any other records outside of his, your Honor.

Mr. Koen: I'm asking these questions on his personal knowledge as a member of the Police Department for 32 years.

[287] Q. By the way, what rank did you hold in 1943? A. I was a lieutenant.

[288] Q. What were your duties in 1943? A. I was assigned to Precinct 5 in Worcester as night lieutenant in charge of the foot patrol.

Q. From your own knowledge, then, as I understand it, you can't tell us whether the superior officer in charge of liquor, or assigned to the license board or assigned to lodging houses were transferred or reassigned on June 1, 1943? Is that the way you want to leave it? A. Yes, sir.

Q. But you do know that the head of the headquarters or vice squad was transferred and the head of personnel? A. That's right. I was a precinct lieutenant in one of the outlying precincts. I didn't have much knowledge.

The Court: The rating officer is usually chief of police, isn't it?

The Witness: The one, sir.

The Court: The one who gives the ratings?

The Witness: Is the chief of police, yes. And he does it on the recommendations of the captains.

The Court: It is predicated also upon what he knows about the man and the supervision that he exercises; isn't that right?

The Witness: That's right.

Mr. Maguire: Have you offered this record, Mr. Koen?

Mr. Koen: No, I haven't offered it.

[289] Mr. Maguire: If your Honor please, I will offer this as a defendant's—

Mr. Koen: I object.

The Court: May I see it?

Mr. Maguire: Certainly, sir (handing to the Court).

The Court (Examining): This is a copy, it is agreed, of what was taken from the records of the Worcester Police that were kept in the ordinary and regular course of business; there is no dispute over that, is there?

Mr. Koen: I think it is an excerpt from official records, yes.

The Court: You don't dispute that?

Mr. Koen: At least that is what the Chief certifies.

The Court: I know what it says here, and I don't want to interject myself in this case—I notice that it says here this is the report on William V. Massei; isn't it?

The Witness: Yes, sir.

The Court: It is the record of his service in the police department and the various changes and promotions. I

notice it says here January 6, 1940 made head of the headquarters squad, plain clothes; is that right?

The Witness: Yes, sir.

The Court: That would indicate, wouldn't it, that beween 1940 and the next time he was shifted he was still head of that squad?

[290] The Witness: That's right, in the interim period he was the head of the squad.

The Court: It says June 1, 1943, assigned to personnel.

The Witness: Yes, sir.

The Court: That would indicate he was moved as head of the headquarters squad and put in charge of personnel?

The Witness: Yes, sir.

The Court: That is the question Mr. Koen asked you.

Mr. Koen: No, in fairness to the witness, no.

The Witness: He was transferred.

The Court: Of course there was only one person in personnel.

The Witness: Yes, your Honor.

The Court: I don't—as long as—

Mr. Koen: I will withdraw the objection.

The Court: I was going to let it go in.

Mr. Koen: Let it go in.

[Excerpt from service records of Worcester Police Department regarding defendant, marked Defendant's Exhibit B.]

The Court: In 1943 he was transferred?

The Witness: He was transferred.

[Mr. Maguire hands the exhibit to the jury.]

Mr. Maguire: That's all.

The Court: Would you come up here?

The Witness: That is the only copy he has of it.

[291] The Court: Mr. Maguire, so we may have this as a matter of record, is there anything that Mr. Maguire should know?

[Mr. Koen confers with Mr. Maguire.]

Mr. Koen: Let me have the photostat and you keep that copy.

Mr. Maguire: No more questions.

The Court: The Deputy Chief is taking the original and leaving a copy?

Mr. Koen: No, the original was in my possession. He had a first copy and the photostat. I put my original in and took the photostat.

City Treasurer, please.

HERBERT E. JACOBSON, Sworn.

Direct Examination by Mr. Koen.

Q. What is your name? A. Herbert E. Jacobson.

Q. Where do you live? A. 6 Devens Road, Worcester.

Q. By whom are you employed? A. City Treasurer.

Q. Of the City of Worcester? A. Yes.

Q. Tow long have you been attached to the office of the City Treasurer in Worcester? A. Thirty-one and a half years.

[292] Q. What is your official title? A. Supervisor of deputy tax collectors.

Q. Were you asked to bring certain documents here this morning in response to a summons? A. Yes, sir.

Q. Have you brought those documents? A. Yes, sir.

Q. May I see them, please? A. [Handing.]

[Mr. Koen confers with Mr. Maguire.]

Q. What are these documents, sir? A. Payrolls.

Q. Payrolls of what? A. Of the police department.

Q. Covering what period? A. From 1937 to 1950.

Q. Through the calendar year 1950? A. Not through the calendar year, but one out of each year.

Q. What, sir, has happened to the records prior to 1937? A. They are destroyed.

Q. They have been destroyed. When were they destroyed? A. I couldn't say.

Q. On the payrolls or records which you have there, does the name of William V. Massei appear? A. Yes, sir.

[293] Mr. Koen: This may be a little irregular, your Honor, but I think Mr. Maguire will not object.

Q. Have you made a compilation of the amounts of money paid to Mr. Massei from 1937 to 1945, inclusive?

Mr. Koen: Any objection, Mr. Maguire?

Mr. Maguire: No, I don't.

A. Inclusive, the whole year, you mean? Of each year? I don't have that record, no. I have one month of each year.

Q. Well, from the records can you tell us what the annual salary of Mr. Massei was for each of the years from 1937 to 1945, inclusive? A. It doesn't state on the payrolls but I think we can—right here (indicating).

Q. In 1937? A. In 1937.

Q. What was his weekly wages? A. $42.

Q. The annual salary is what? A. Approximately $2,100.

Q. 1938? A. The same.

Q. By the way—all right. 1939. A. 1939, the same.

Q. 1940—

Mr. Maguire: Would you please—1939, Lieutenant [294] Massei was made a sergeant.

The Witness: I have that one right here now. In September when he was made a sergeant, two payrolls. When he was first made a sergeant is September, 1939. That is a monthly payroll. $212.50. No. In this particular— September 11, when he was made a sergeant, pay was $134.58. That isn't for the whole month.

Q. But the monthly rate for October through the balance of the calendar year was what? A. $212.50.

Q. 1940. A. 1940, $212.50. September.

Q. Each month. $212.50 a month; right? A. That's right.

Q. Well, on the 1940 payroll, sir, does the annual salary appear? A. Yes. $2,550.

Q. $2,550 per year? A. Per year.

Q. All right, sir. In 1941. A. I haven't 1941.

Q. You don't have 1941? A. I don't have 1941.

Q. Do you know what happened to that record, sir? A. No, I don't.

[295] Q. 1942, if you will. A. 1942.

Q. The annual salary. A. $212.50; $2,550.

Q. $212.50 per month, $2,550 per year? A. Yes.

Q. Having in mind the salary for 1940 was $2,550 per year and for 1942 was $2,550 per year, can you tell us what the salary was in 1941, per year? A. No, I couldn't.

Q. If it was $2,550 in 1940 and it was $2,550 in 1942, it figures in the intervening year it was what? A. $2,550.

Q. 1943, please. A. $2,550.

Q. Beginning in 1943, was there another item? A. Yes, clothes allowance per month $5.

Q. $5 a month in addition to salary? A. In addition to salary.

Q. 1944, please. Salary? A. Salary, $2,550, and the $5 per month. $212.50 per month. Total amount $232.66.

Q. All right, sir. 1945. A. $2,850 per year.

Q. Was there a clothing allowance? [296] A. Clothing allowance of $5.

Q. Each month? A. Each month.

Q. 1946. A. $2,850. $5 a month clothing allowance.

Q. All right. 1946. A. That is 1946.

Q. 1947; I'm sorry. A. 1947, $3,300.

Q. With a clothing allowance? A. Clothing allowance of $5.41.

Q. $5.41 each month? A. Yes, each month.

Q. All right, sir. 1948. A. $3,300; $5.41. 1949?

Q. Yes, sir. A. $4,080; $6.50 per month.

Q. $6.50 per month is the clothing allowance? A. Clothing allowance. 1950, $4,080; $6.50 clothing allowance.

Q. All right, sir. Now, these are not the entire documents, are they? A. No.

Q. These are representative documents? A. Yes, sir.

Q. There are 15 payrolls there, sir; is that right, [297] representative payrolls? A. Yes, sir.

Q. Will you tell us the manner in which payments are made to the police officers by the Treasury Department? A. Is that cash, you mean?

Q. Is it by cash or by check? A. It is by cash.

Q. Now, will you take those representative payrolls which you have there, sir, and tell us whose name appears as receiving the money earned by Sergeant or Patrolman or Lieutenant Massei? A. [Examining.]

Q. On those payroll sheets, sir, in the extreme righthand side there is a column reading "Received the amount set against our names respectively, being in full for services for the time stated." Will you read off from that list of payroll records the name of the person who accepted the money from the City of Worcester for the defendant William Massei?

Mr. Maguire: Have you examined them, Mr. Koen? Can we agree on this without going through them?

Mr. Koen: I examined them Tuesday.

A. Do you want me to take from year to year—

Q. All right. On the payroll September 9, 1939, against the name William V. Massei whose name appears? A. Isabel Massei.

Q. And on the September 30, 1939, as a sergeant, whose name [298] appears against the name William V. Massei. A. Isabel Massei.

Q. September 30th, 1940? A. Isabel Massei.

Q. September, 1938? A. Isabel Massei.

Q. February, 1937? A. Isabel Massei.

Q. January, 1942? A. Isabel Massei.
Q. July, 1942? A. Isabel Massei.
Q. October, 1943? A. Isabel Massei.
Q. August, 1944? A. Isabel Massei.
Q. August, 1945? A. Isabel Massei.
Q. August, 1946? A. Isabel Massei.
Q. September, 1947? A. Isabel Massei.
Q. April, 1948? A. William Massei.
Q. December, 1949? [299] A. Isabel Massei.
Q. And February of 1950, sir? A. Isabel Massei.

The Court: May I interpose here? We will have a recess.

[Brief recess.]

[300] Q. Mr. Jacobson, do you know Mrs. Massei? A. Yes, sir.

Q. Were you ever associated with her in your official capacity? A. As—

Q. To put it another way, was she an employee of the City Treasurer's Department of the City of Worcester? A. Yes, sir.

Q. From what period, sir? A. 1929 temporary, until she went on in 1932 as permanent, and she left in November, 1933.

Q. And what was her maiden name, sir? A. Isabel Cummings.

Q. And do you have any information, sir, as to the rate of pay that she earned during the four years that you have just mentioned? A. Yes. As temporary, in 1929, 44 cents per hour with an overtime average, about $18 a week; '30 the same, and '31 the same; in 1932, when she was made permanent, $20 a week.

Q. Was that the rate of pay that continued until she left the Treasurer's office in November of 1933? A. That is right; yes, sir.

Mr. Koen: That is all.

Mr. Maguire: No questions.

Mr. Koen: Mr. Donohue.

[The witness is sworn.]

Mr. Koen: May we go to the bench, sir, before I start [301] to question this witness, to inform you of the purpose of the evidence?

The Court: Yes, come up. [To jury.] You understand why we are doing this. There is a desire on the part of both counsel to have only admissible evidence and to have an opportunity to present the matter up to the bench, and I want to commend both for having followed that rule.

[Conference at the bench, during which the following is recorded:—

Mr. Koen: This is the Register of Probate of Worcester County, F. Joseph Donohue, a graduate of Holy Cross and a classmate of mine in Boston University. I have here the records of Mr. Massei's father's estate. Now these may or may not become of importance, depending on what your Honor does with reference to the ultimate question involving admissions of counsel, because in that series of documents there is mention of the fact that this man received X dollars from his father's estate. I don't know the amount so mentioned but I have here the official records of the Registry of Probate and will show through Mr. Donohue that the estate was probated, the will was probated, and I think it will also show that no inventory was ever filed.

[302] Mr. Maguire: Well, I wonder, in view of the fact that this is going to come in on what you rule Monday, whether or not that couldn't wait.

Mr. Koen: Why don't I put it in de bene?

Mr. Maguire: I don't know.

The Court: Was there a final distribution made?

Mr. Maguire: No.

Mr. Koen: No.

The Court: No inventory?

Mr. Koen: No inventory filed.

The Court: Certainly it would be filed for purposes of taxation up at the State House?

Mr. Koen: It was not.

The Court: Have you been up at the State House?

Mr. Koen: There would be an inventory filed in the Probate Court.

Mr. Maguire: May I suggest that we agree on it and if you rule in his favor Monday, that will leave this stuff in the record.

Mr. Koen: And there is another aspect, too. I think it is material and relevant to show that through the prosecuted years he did not receive any gifts by inheritance or otherwise.

[303] Mr. Maguire: If there was no inventory filed, what does it prove?

Mr. Koen: I have got to lay a foundation, because I am going to call his brother to testify as to what he received from the estate, that was embraced within the estate.

[304] Mr. Maguire: My suggestion is that we wait and see what happens Monday or Tuesday, whenever you decide on this other. No sense in keeping him around. We would be very glad at that time to read any records—

The Court: Why couldn't you have him state who he is and turn the records over and let them be kept marked for identification, with the understanding they will be offered in evidence.

Mr. Maguire: Depending on what happens—

Mr. Koen: If your Honor is going to go on that basis, I would much rather have him testify these are

the records and have them marked as exhibits and then stricken later on.

The Court: If I have them marked for identification and counsel agrees and let that other evidence in, then they go in.

Mr. Koen: You are supposed to have the identification aspect of the records stricken.

The Court: You don't have to. All you do is offer it.

Mr. Maguire: I would think that would avoid any chance of error.

The Court: He will agree that will go in evidence; right?

Mr. Maguire: Depending on your ruling.

[305] The Court: That will depend on my ruling. Unless you want to bring the witness back here.]

The Court: Will counsel come up again?

[Further conference at the bench:

The Court: What harm will it do if it is offered now? What harm does it do? It shows his father died. It is negative value.

Mr. Koen: I don't agree with that.

The Court: Now it is not.

Mr. Maguire: That's right. Apparently they are going to use it in terms of some admissions Garrity is alleged to have made. Whether or not that comes in Monday depends—

Mr. Koen: It has a twofold purpose: one, to show that the basis as the basis for these admissions or statements which we say are erroneous—

The Court: Was there a will?

Mr. Koen: Surely.

The Court: How could a petition for administration predicated upon what is allowed by the court in a situation where there has been no inventory, in a situ-

ation where there has been no expression of any kind in writing as to the right of this estate—how could you use it?

Mr. Koen: It isn't as simple as that, your Honor. [306] It has two purposes. I have told you the first one.

The Court: I know the first one is that he died and left an estate; isn't that right?

Mr. Koen: That is a statement that was made by his counsel. If that statement is incorrect and he has made a false and erroneous statement as to income received during the prosecutive years, that is evidence of concealment.

The Court: How can you show it by the production and allowance of a will where there is no inventory filed?

Mr. Koen: I agree to supplement by other evidence by the executor and the other residual legatee.

The Court: I will admit it under those conditions.]

The Court: I will admit this under the condition it becomes correlated later on with other evidence.

Mr. Foreman and Ladies and Gentlemen of the Jury, you are to accept this under conditions which—unless other circumstances develop, Mr. Maguire, and I will entertain a motion to strike; do you follow me? And certain conditions over which I have to pass upon later on are resolved in favor of the government, then this may well become competent; you agree to that. So I am admitting it and I admitting it with the hope and expectation you will just receive it factually and that at the present time it has no significance. We ordinarily use the [307] phrase "de bene." That means "for the time being." And I don't like to use that phrase in the trial of cases, but if it is proper to use it I will use it here as descriptive of the position that the Court has taken.

Are you satisfied with that, Mr. Maguire?

Mr. Maguire: Well, I would like my objection to be noted, your Honor, because as I look at it, it has no bearing on this point.

The Court: I am only doing it on the basis of certain things Mr. Koen said at the bench. If those things are not shown, of course I will not rely upon you to ask to have it stricken. I will do it myself. I will assume the responsibility.

Mr. Koen: Your Honor is referring to one of the two propositions which I advanced at the bench?

The Court: That's right. The second proposition is one that may not be predicated on this, or may be. But it is a corollary from the first, isn't it? I mean it is a step in furtherance of the first one; isn't that right?

Mr. Koen: It might or might not be, but I think the second of the propositions I advanced can stand independently of the first one.

The Court: I will pass upon that now and I will admit this de bene, so to speak. I am doing it because Mr. Donohue is here and there is no need of bringing him back again.

[308] F. Joseph Donohue, Sworn. (see page 300)

Direct Examination by Mr. Koen.

Q. Your name, sir? A. F. Joseph Donohue.

Q. Where do you live? A. 722 Pleasant Street, Worcester, Massachusetts.

Q. Do you hold some official position within the Commonwealth? A. I do.

Q. What position is that? A. Register of Probate for Worcester County.

Q. As the Register for the County of Worcester did you bring, at my request, certain documents here today? A. I did.

Q. Are you the custodian of these documents and are

they kept under your general supervision and direction? A. That's right.

Q. Under the laws of the Commonwealth. May I have the documents? A. [Handing.]

The Court: They are kept by you under a mandate of the statute; isn't that right?

The Witness: That's right, your Honor.

The Court: You being the Register of Probate and in charge of all those records?

The Witness: That's correct.

[309] [Discussion off the record.]

Q. I ask you, sir, what is the first of these three documents? A. Petition for probate of the will of Pilade Massei, who died February 2, 1949, and it is a petition by John L. Bianchi to be appointed executor of his estate.

Q. In the petition, as was filed, are there listed heirs-at-law or next of kin of one Pilade Massei? A. Yes, sir.

Q. Will you tell us who those are, as they are recited on the face of that petition? A. Annie Moretti, Los Banos, California, daughter, and Lena Masiello, Worcester, Massachusetts, a daughter, William V. Massei, Worcester, Massachusetts, a son, and Edward H. Massei, Worcester, Massachusetts, another son.

Q. At the time that petition was filed or subsequent to the filing of the petition was a will filed? A. Yes, there was. It is filed ordinarily with the petition.

Q. And was the petition for the probate of the will that was filed allowed? A. It was allowed on June 1, 1949.

Q. And who was appointed the executor of the will? A. John L. Bianchi.

Q. I show you this other document and I ask you what the third of those documents is? A. That is an executor's bond without surety.

[310] Q. Signed by whom? A. Signed by John L. Bianchi. Allowed—approved, rather, on June 1, 1949.

Mr. Koen: I offer these three documents and, if I may, may I immediately withdraw them and substitute therefor photostatic copies?

[Petition for probate of will of Pilade Massei, will and executor's bond marked Government's Exhibit No. 23.] [Photostatic copies substituted.]

Q. Now, Mr. Donohue, are these all the records which are in your possession as Register of Probate for the County of Worcester? A. You mean in this particular case?

Q. In this particular case. A. That's right.

Q. Following the allowance of a will and the filing of a bond by the executor, is there a requirement on you to issue a document to the executor which is commonly re-referred to as an inventory? A. No.

Q. Was an inventory issued in this case? A. No.

Q. Was an inventory or a statement ever filed as to the assets of this estate? A. No.

Q. Has there been any account of any sort filed in this estate? [311] A. No.

Whether a first or intermediate account? A. None whatsoever.

Mr. Koen: That's all.

Mr. Maguire: No questions.

Mr. Koen: You are excused.

The Witness: Thank you.

Mr. Koen: Mr. Joseph Urso.

JOSEPH URSO, Sworn.

Direct Examination by Mr. Koen.

Q. What is your name, sir? A. Joseph Urso.

Q. Where do you live? A. At the present time?

Q. Yes, sir. A. Ashaway Road, Westerly, Rhode Island.

Q. What is your business, sir? A. Plumbing.

Q. How long have you been in the plumbing business? A. Oh, approximately probably 12 or 15 years.

Q. In the course of the conduct of your business as a plumber did you, some time in 1948, meet Mr. Massei, the defendant in this case? A. Yes, sir.

Q. Can you tell us the circumstances under which you met him, [312] sir? A. I done some work at his house.

Q. Will you tell us the nature of the work? A. Installed some plumbing fixtures.

Q. Have you the records with you, sir, covering the business that you did with him in 1948? Can you help us as to the month? A. [Examining]

Q. I am asking for the original records of the business you conducted with the defendant Massei in July of 1948. Will you speak up, sir? A. I had furnished the material and plumbing fixtures and labor for his house down there.

Q. And were you paid for your services and the labor and the material which you furnished, sir? A. Yes, sir.

Q. How much were you paid? A. I was paid a total of $856.87.

Q. May I see the entry on that? A. [Indicating.]

Q. I show you a bill and I ask you if that is a portion of the monies that you received? A. Yes, sir.

Q. Photostatic copy of the original bill, is it? A. Yes.

Q. Now, sir, you have—and the amounts of that, sir? [313] A. $764.59.

Mr. Maguire: I don't hear.

Mr. Koen: $764.59, sir.

Q. Now, in addition to that there was a subsequent payment of how much, sir? A. $92.28.

Q. Can you tell us what that was for? A. That was for fixtures and labor.

Q. In addition to those which are on this bill rendered under date of July 13, 1948? A. That's right.

Q. Can you help us, sir, as to how that bill of $764.59 was paid? A. How?

Q. Yes, sir. A. I am not sure.

Q. Well, if I may, I show you this and ask you to examine it and see if that refreshes your recollection.

Mr. Maguire: May I look at it, Mr. Koen, please?

Mr. Koen: Sorry (handing to Mr. Maguire).

[Mr. Maguire examines the document.]

Q. I ask you if that refreshes your recollection, sir, as to how that bill was paid. Will you examine the reverse side, too, before you answer the question. A. I think it was by check.

[314] Q. I beg your pardon, sir? A. I think it was paid by check.

Q. What is that document which you have in your hand? A. This here?

Q. Yes. A. Well, it is a canceled check.

Q. Photostatic copy of a canceled check. Payable to whom, sir? A. To myself.

Q. The amount? A. $770.

Q. The maker of the check as it appears on the face of it? A. Isabel C. Massei.

Q. Is there an endorsement on the reverse side? A. Yes, there is, mine.

Q. Your endorsement? A. Yes, sir.

Q. And from the notations on the reverse side, can you tell what you did with the check? I direct your attention to that, sir (indicating). A. I cashed it.

Q. Or deposited it, which? In any event, you got the money, is that it? A. Yes, sir.

Mr. Koen: This I offer. It is dated July 13, 1948.

[Check dated July 13, 1948 referring to Joseph Urso marked Government's Exhibit No. 24.]

[315] Q. Do you have the original invoice of which this is a photostatic copy, sir? A. No, I haven't.

Q. Do you know where it is? A. At home.

Q. At home? Is this an exact reproduction of the original invoice which you tendered? A. Yes, sir.

Mr. Koen: I offer it.

Mr. Maguire: I think we ought to have the original, your Honor.

The Witness: Can I tell you something about this—

Mr. Koen: I will withdraw it.

The Court: You are entitled to have the original. Mr. Maguire has been very cooperative.

Mr. Koen: I withdraw the question. I don't want to complicate it, sir. I have no further questions.

Cross-examination by Mr. Maguire.

X-Q. I show you another check dated April 15, 1949 payable to you, Joseph Urso, drawn on the Worcester County Trust Company. The maker of the check is Isabel C. Massei? A. Yes.

X-Q. And on the back is Joseph Urso. It is another payment to you by Mrs. Massei? A. Yes, sir.

[316] Mr. Maguire: I will offer this.

Mr. Koen: May I see it?

Mr. Maguire: I beg your pardon (handing to Mr. Koen).

Mr. Koen: April 15, 1949? $93.

[Check dated April 15, 1949 regarding Joseph Urso marked Defendant's Exhibit C.]

Mr. Maguire: No more questions.

Redirect Examination by Mr. Koen.

Q. What was the $93 check tendered in payment of, sir? A. Was it a check, you asked?

The Court: What was it in payment for?

The Witness: For labor and fixtures at the same house.

Q. At the house? A. Yes, sir.

Mr. Koen: All right, sir. Samuel Urso.

SAMUEL URSO, Sworn.

Direct Examination by Mr. Koen.

Q. Your name, sir? A. Samuel Urso.

Q. Where do you live? A. Shore Road, Westerly, Rhode Island.

Q. What is your business? A. Building contractor.

Q. Will you speak up, sir? A. Building contractor.

[317] Q. How long have you been in the business as a building contractor? A. About 20 years.

Q. Directing your attention to the year 1948, sir, did you have a meeting and a conference with the defendant William Massei? A. Yes.

Q. And as a result of that did you do some work for him? A. Yes.

Q. Tell us what you did for him, sir. By the way, how many times did you talk to Mr. Massei before you performed this work? A. Oh, a couple of times, I guess.

Q. All right. As a result of those conferences, tell us what you did. A. I built the house for Mr. Massei on Shore Road.

[318] Q. Have you certain records with you concerning the building of that house? A. Yes.

Q. May I see them? A. Yes. [Handing.]

Q. What is that document, sir [handing]? A. These are payments Mr. Massei paid me for doing all these items.

[Documents handed to Mr. Maguire.]

Q. Will you tell us from your records, sir, what the total cost was for constructing the house for Mr. Massei in Westerly, Rhode Island? A. He paid me $9,966.25.

Q. And can you tell us the year during which those monies were paid to you? A. During the year 1948.

Q. 1948? A. Yes, sir.

Q. Now did you ever have any other financial transaction of any sort with Massei, Mr. Massei? A. No, sir.

Q. Was the amount of money paid to you in one payment or were there several payments, if you know? A. Several payments.

Q. Do you know how many such payments were made, total number? A. Seven.

[319] Q. Can you help us as to the type of payment, that is, were the payments made by check or by cash? A. As near as I can remember, I think it was three by check and the rest was cash. I'm not sure.

Q. Three by check and the rest by cash? A. Yes.

Q. I show you this document, this photostatic copy of a canceled check, and I ask you to examine it. A. Yes, sir.

Q. Do you recognize the signature on the reverse side of that? A. Yes.

Q. Whose signature is it? A. Mine.

Q. The date of the check, please, and the amount? A. April 5, 1948, $600.

Q. And the maker? A. Isabel C. Massei.

Q. For what was that check tendered, sir? What did you receive that check for? A. For material and labor that I used on this house.

Q. On the house which you discussed with Mr. Massei? A. Yes.

Q. I show you a check and I ask you to examine that. Is there an endorsement on the reverse side? A. Yes.

[320] Q. Whose endorsement is that? A. This is mine.

Q. Will you give me the date of the check and the amount? A. April 12, 1948, $2,000.

Q. Made by whom and to whom? A. Isabel C. Massei to Samuel Ureo.

Q. That's you? A. Yes.

Q. And what was that $2,000 given to you for? A. Payment on this house.

Q. I show you another check dated June 1, 1948. Will You examine that? A. Yes. This [pointing] is mine.

Q. It is yours? A. Yes.

Q. The date and the amount? A. June 1st, 1948, $2400.

Q. Made by whom to whom? A. Isabel C. Massei to Samuel Urso.

Q. And for what was that payment? A. Payment of the building of the new home.

Q. These three checks total $500. Did I understand you to say your best memory is the balance—

Mr. Maguire: May I suggest, Mr. Koen, you ask him a question without leading him, to see if he has any memory of any other checks?

[321] A. What was that question?

Q. When I asked you a question previously, sir, did you tell me your best memory was you received three checks and the balance was in cash? A. Yes, that is right.

Mr. Koen: That is all I wanted to establish. I offer these checks.

Mr. Maguire: No objection.

[Three checks evidencing payments to Urso marked Government's Exhibit 25-A, B, C, respectively.]

The Court: Was the preceding witness your brother?

The Witness: Yes.

The Court: He's in the plumbing business, is he?

The Witness: Yes, your Honor.

The Court: Whatever payments were made to you didn't include the payments that were made to him, did they?

The Witness: They didn't include them.

The Court: You didn't do the work that is done by subcontracting?

The Witness: Yes, I done some of the subcontracting. The plumbing was done directly through Mr. Massei.

The Court: And the heating, too?

The Witness: There was no heating.

The Court: The plumbing was done by—

The Witness: My brother.

[322] The Court: —your brother?

The Witness: Yes.

Q. I don't know whether I have asked you this or not, sir. Will you tell me exactly where this home was that you constructed for Mr. Massei? A. It is called the Shore Road, Westerly, and it is right in Misquamicut.

Q. Shore Road, Westerly, is the proper description of it? A. Yes.

Q. Can you describe the area in which this house was located, that is, was it a summer colony or was it a permanent setup? A. They have mostly summer homes there.

Mr. Koen: I think that is all.

Mr. Maguire: No questions.

Mr. Koen: Mr. Comerford.

The Court: Would you like to take a recess now and come back at 2 o'clock, and then Friday afternoon I could let the jury get away about 10 minutes to 4, where traffic is heavy and avoid—some come by automobile. Don't you think you'd like that better? [Jurors assent.] Then, we'll do that, come back at 2 o'clock.

[Recess from 12:47 p.m. to 2 p.m.]

[323] AFTERNOON SESSION

The Court: All right, Mr. Koen.

EDWARD COMERFORD, JR., Sworn

Direct Examination by Mr. Koen

Q. What is your name, sir? A. Edward Comerford, Jr.

Q. Where do you live? A. Stonington Road, Pawcatuck, Connecticut.

Q. Did you at some time own some property in Westerly, Rhode Island, sir? A. I did.

Q. Can you tell us generally where the property was located? A. Situated in the town of Westerly, summer resort called Misquamicut.

Q. At some time in 1947 did you come to know the defendant, Mr. Massei? A. I did.

Q. Did you have some business with him at that time? A. I did.

Q. Would you tell us the nature of the business, sir? A. Property which I owned in Misquamicut that was for sale and Mr. Massei saw a sign which I had placed on the property and became interested and contacted me.

Mr. Koen: I beg your pardon?

The Court: "Mr. Massei became interested, he saw a [324] sign on the property and contacted me."

Mr. Koen: Thank you, sir.

Q. How many lots of land did you own there, sir? A. There were two plots adjacent to each other.

Q. And at some time did you sell the property to Mr. Massei? A. I did.

Q. Do you remember how much you sold the property for? A. $1,600.

Q. Can you tell us when you sold the property to him? A. The exact dates are a little beyond my recollection, exactly, but from notations I have gathered, it was around —the first deposit was paid to me around the 17th of August in 1947.

Q. And the balance, if you know? A. The balance was paid about 10 days later, I believe.

Q. Was that at the time of the passing of the papers, so-called? A. It was.

[Mr. Koen confers with Mr. Maguire.]

Q. I show you this document, which has already been examined by Mr. Maguire, and call your attention to this particular line here. Does that help you as to when you signed the document, sir? A. Yes, it does.

Q. What date appears on the ? A. 28th of August, 1947.

Mr. Koen: All right. I offer this certified copy of the deed, may it please the Court, executed on the 28th of [325] August, 1947 and recorded on the 29th of August, 1947.

Mr. Maguire: May we have the grantee, Mr. Koen, please?

Mr. Koen: From Edward F. Comerford, Jr. and Lucy C. Comerford, husband and wife, to William V. and Isabel C. Massei, husband and wife, and to the survivor as joint tenants and not as tenants in common.

[Certified copy of deed, Comerford to Massei, marked Government's Exhibit No. 26.]

The Court: All that means is that if one died the other would get it without the necessity of probate.

Q. Have you any memory, sir, as to the method or the manner of payment, whether either of the payments to you were made by cash or by check? A. It was paid entirely by cash.

Q. Entirely by cash, the entire $1,600? A. Yes, sir.

Mr. Koen: Thank you. I have no further questions.

Cross-examination by Mr. Maguire

X-Q. I take it you are familiar with this locality down there in Westerly? A. Yes, sir.

X-Q. How far are these two lots or plots from the beach; seven-tenths of a mile, would that be about right? A. Approximately, yes.

X-Q. Is it not true there are a number of winter homes in that [326] particular section? A. There are, yes.

X-Q. Are you aware that the house that the Masseis built was a winterized home?

Mr. Koen: Wait a minute. If he knows. Do you know?

The Witness: I don't know.

Mr. Maguire: That's all; thank you.

Redirect Examination by Mr. Koen

Q. Are you familiar with the section so that you could tell us whether or not your lots were adjacent to or near the lots formerly owned by Judge Saunders? A. They were part of Saunders' farm, or estate. I purchased them from a sister of Judge Saunders.

Q. Are you familiar with the land that was owned by Mrs. Whitford? A. I know of it by hearsay.

Q. Do you know which lots she owned—

Mr. Maguire: Well, if you please—.

Q. Do you know which lots she owned? A. No.

Mr. Koen: That's all I wanted to know.

Q. Are you familiar with the lots which were owned by a Mr. Pingitore? A. No.

Mr. Koen: All right, sir; that's all.

Mr. Maguire: That's all, Mr. Comerford.

[327] DOMINIC PINGITORE, Sworn

Direct Examination by Mr. Koen

Q. What is your name, sir? A. Dominic Pingitore.

Q. Where do you live, sir? A. 12 Plantation Street, Worcester, Massachusetts.

Q. What is your business, sir? A. I got a tavern.

Q. A tavern, in Worcester? A. Worcester, Massachusetts, yes.

Q. Prior to 1948, sir, did you own some land in Westerly, Rhode Island? A. Yes.

Q. And the land was one or two or more lots, if you remember? A. I think it was three lots.

Q. How many? A. Three.

Q. By the way, do you know Mr. Massei? A. Yes.

Q. And in 1948 did you have some dealings with him with reference to the land which you owned in Westerly? A. Yes.

Q. Did there come a time, sir, when you transferred the land from yourself to Mr. Massei? Did you sell the land to him? [328] A. I sold the land to Mr. Massei.

Q. You gave him a deed to the land or a deed to him and his wife? A. Yes.

Q. How much did Mr. Massei pay you for those three lots of land? A. $1200.

Q. Can you tell us approximately the time in 1948 that you sold this land to Mr. Massei, what month of the year? A. I think it is June.

Q. June. How did Mr. Massei pay you for this land, by cash or by check? A. Cash.

Q. One $1200 payment in cash? A. Yes, sir.

Mr. Koen: That is all.

Mr. Maguire: No questions.

The Court: How many feet, what was the size of the lots?

The Witness: Your Honor—

The Court: Turn to the jury. What was the size of the lots?

The Witness: I do not know, your Honor, I think it may be 65 feet. You know, one lot, another one may be 50 feet, I do not know.

The Court: What does the deed say?

[329] Mr. Maguire: Not very big, I take it.

The Court: 65 by—

Mr. Koen: The deed is silent.

The Witness: 175, 160, I do not know.

Mr. Koen: You do not know?

Mr. Maguire: Thank you, Mr. Pingitore.

JOHN S. SHERMAN, Sworn

Direct Examination by Mr. Koen

Q. What is your name, sir? A. John S. Sherman.

Q. Where do you live, sir? A. Collinsville, Connecticut.

Q. By whom are you employed? A. The George Motor Company.

Q. Where are they located? A. 60 Shrewsbury Street, Worcester, Massachusetts.

Q. What is your position with the George Motor Company? A. I am the office manager, sir.

Q. How long have you been so employed? A. Just over five months.

Q. Are you the person in whose custody the records of the company are kept? A. That is correct.

Q. Records that are made in the ordinary and usual course of business? [330] A. That is correct.

Q. Were you asked to bring certain documents here today? A. I was.

Q. Have you those documents? A. I have.

Q. The documents which you have in your possession are kept in the ordinary and usual course of business of the George Motor Company? A. That is correct.

Q. Are the entries which appear thereon, were they made at or about the time reflected on those documents? A. That is correct.

Q. May I see them, please? Have you with you, sir, certain records—pardon me—covering the year 1944? A. No, I haven't, sir.

Q. Do you know where those records are? A. Yes, sir. They would be in Worcester.

Q. Pardon? A. They would be in Worcester, Massachusetts, at the place of business.

Q. Directing your attention, if I may, to April 8th, 1946,

do you have records pertaining to one William V. Massei? A. I have.

The Court: Just answer it yes or no, have you, yes or no?

The Witness: Not exactly on that date.

[331] Q. What records have you pertaining to April, 1946?

[A short pause.]

Q. All right, sir, what is the sheet at which you are now looking? A. The month of May, 1946.

Q. What is the caption on the sheet? A. Sales Summary, Cars.

Q. Does the name William V. Massei appear there as a purchaser? A. Yes, it does.

Q. Will you tell us what the entry indicates? A. William V. Massei purchased from George Motor Company a 1946 Dodge Sedan, Deluxe, two-door, serial number 30673159. Total amount of the sale was $1,213.88.

[332] Q. Have you an invoice, sir, covering that transaction? A. Not covering that transaction, no, I haven't.

Q. Is there any such invoice in your record at this time? A. No, there isn't. That invoice has been destroyed.

Q. I show you this document, sir, and I ask you to examine it. A. [Examining.]

Q. Have you ever seen the original of which that is a copy? A. No, I haven't, sir.

Q. Is that a type of letterhead which you used or is used by the George Motor Company? A. That is a photostat of one of our billheads, yes, sir.

Q. Have you examined the document with reference to the entry which is included in your records under sales summary for May, 1946? A. I have.

Q. Have you checked the serial or motor numbers? A. I have.

Q. Whether or not they correspond? A. I have. This is the same car.

Mr. Maguire: No objection.

[1946 invoice of George Motor Company marked Government's Exhibit No. 27.]

Q. Directing your attention now to 1948, March 10 of 1948. A. Yes, sir.

Q. Will you refer to your records? [333] A. On March 10, 1948 in our sale summary cards we have an entry, purchaser, William P. Massei, on that date, 1948 Dodge two-door de luxe sedan, serial number 31030203, for the total sale price of $1,817.45. On this car he traded us a 1946 Dodge, serial number 30673195, on which we allowed him $1,475.45. The money difference involved was $400.

Q. Have you an invoice or a record covering that? A. No. I have an original purchase order or sales order signed by Mr. Massei.

The Court: You allowed him $200 more than what he paid for it, after using it two years?

The Witness: Right. Your Honor, at that time—

The Court: No, there is no comment necessary.

[Mr. Koen hands a paper to Mr. Maguire.]

Mr. Maguire: I have no objection.

Mr. Koen: I offer this document.

[Original sales order dated March 6, 1948, George Motor Company, marked Government's Exhibit No. 28.]

Q. I direct your attention to the date of March 28, 1949, sir. Do you find any entries reflected on or about that date? A. In our car sales summary we have an entry on that date, purchaser, William P. Massei, did purchase from us a Coronet Club Coupe, 1949 Dodge, a new automobile, serial number 31258621; the total sale price, $2,220.60. On this car he did trade his 1948 Dodge two-door sedan, serial number 31030203, for which allowance was made, $1,607.45. The cash on delivery, [334] or the money difference was $613.15.

Q. May I see that? A. [Handing.]

Q. Who signed that as the purchaser, sir? A. William V. Massei.

[Mr. Koen hands papers to Mr. Maguire.]

Mr. Koen: I offer these.

[George Motor Company sales order dated March 23, 1949 and copy of invoice dated March 28, 1949 marked Government's Exhibit No. 29.]

Q. Directing your attention to the 18th of December, 1950, sir, do you have any records on that date? A. In our sale summary cards we have an entry on that date, purchaser, William V. Massei; he bought from us a new 1950 Dodge Coronet Club Coupe, serial number 31611208. Full sales price was $2,250.30.

The Court: The what?

The Witness: Full sale price was $2,250.30.

The Court: You mean you sold it to him at the full sale price?

The Witness: No. That was list price at that time. I believe we were under Regulation W, at that time. Ceiling prices. He traded his 1949 Dodge Club Coupe 31258621, on which allowance was made of $1,650.30. The money difference involved was $600.

Q. Who signed the original order form, sir? [335] A. William V. Massei.

[Mr. Koen hands a paper to Mr. Maguire.]

Mr. Koen: Without objection I offer these, sir.

[George Motor Company sales order dated December 15, 1950 and invoice dated December 18, 1950 marked Government's Exhibit No. 30.]

Q. Is there anything, sir, in your records to indicate whether or not the difference between the sale price or the balance due, or the difference between the sale price and the trade-in allowance, is there anything there to indicate in what manner that was paid? A. No, there isn't.

Q. Was there on any of these transactions? A. Not on any of these transactions.

Mr. Koen: All right, sir; I have no further questions.

Mr. Maguire: No questions.

Mr. Koen: Heywood-Brunmark.

ERNEST RENAUD, Sworn

Direct Examination by Mr. Koen

Q. What is your name, sir? A. Ernest Renaud.

Q. Where, sir, do you live? A. 6 Emerson Road in Worcester.

Q. By whom are you employed? A. By Heywood-Brunmark Motor Company.

Q. In what capacity? [336] A. Office manager.

Q. How long have you been employed in that capacity, sir? A. Eight months.

Q. Are you the person who has custody of the records of the Heywood-Brunmark Motor Company? A. Yes, sir.

Q. Have you brought certain records here today in response to a summons? A. Yes.

Q. Are the records which you have brought here today records kept normally in the usual course of business? A. Yes, sir.

Q. And under your general supervision and direction? A. Yes, sir.

Q. And the entries which appear there on, were they made at or about the time reflected on those records? A. Oh, yes.

Q. May I see them, sir? A. Certainly. [Handing.]

Q. Have you an order form? A. No, I do not.

Q. All right, sir. Directing your attention to the 13th of March, 1950, is there anything there reflecting the sale of a Ford sedan coupe? A. Well, I have an entry on my

sales summary. I can not tell [337] you what type of car it was. I know it was a used car.

Q. A used car? A. Yes, sir.

Q. What type of used car was it?

Mr. Maguire: Mr. Koen, may we have to whom this car was sold, please?

Mr. Koen: I will get to that in a minute, yes. I just want to be sure we are talking about the same car.

A. I can't tell the type of car. I just can tell the invoice number and price.

Q. What is the invoice number? A. 2768.

The Court: Is it the usual custom and practice when a car is sold, used car, not to put down the type of car?

The Witness: Well—

The Court: No. Is it?

The Witness: Not in our journal.

The Court: As a matter of fact you have to keep it; isn't that right?

The Witness: We have to in other records but not in the journal.

The Court: You did it in some other record?

The Witness: We did at the time, yes.

Q. Will you tell us to whom the car was sold? A. To Isabel Massei.

[338] Q. And the price? A. $900—

Mr. Maguire: If your Honor please, will you note my objection to all of this testimony?

The Court: That's right.

Q. The price, please? A. $900.

Q. From your journals can you tell us whether it was more than one payment, and if there was, the dates? A. Yes, there was more than one payment.

Q. How many, sir? A. Two.

Q. The first one? A. $100 on the 13th. Well, it was recorded on the 13th.

Q. Was that by cash or by check? A. I have no way of knowing, sir.

Q. And the second one? A. The second one was on the 16th, on the day of delivery, $800.

Q. Do you have a copy of the invoice at all in your possession, sir? A. No, I do not.

Q. I show you this document, sir, and I ask you to examine it. A. [Examining.]

Q. What is that document? A. Well, it is a copy of a billhead that we have used at one [339] time, yes.

Q. Covering what? A. Covering the sale of one 1946 Ford sedan coupe.

Q. To whom? A. To Isabel Massei, Shore Road, Westerly, Rhode Island, for $900. Cash deposit, $100; balance due, $800.

Q. And marked at the bottom with a stamp in what manner? A. It was marked paid on the 16th.

Mr. Koen: I offer it.

Mr. Maguire: No objection.

[Heywood-Brunmark invoice marked Government's Exhibit No. 31.]

Mr. Koen: I have no further questions.

[340] *Cross Examination by Mr. Maguire*

X-Q. Do you have anything in your records that will tell you how this $800 was paid? A. No, I do not.

X-Q. I show you a check dated March 16, 1950. A. What is that?

X-Q. Payable to Heywood-Brummark, in the amount of $800, drawn on the Worcester County Trust Company, signed Isabel C. Massei. The endorsement, Pay to the order of the Mechanics National Bank, Heywood, Brummark Motor Company, R. E. Heywood, Treasurer. A. That corresponds to my entry in this book.

X-Q. That would indicate to you it was paid by— A. By check.

X-Q. By Mrs. Massei? A. Certainly.

Mr. Maguire: I offer that.

Mr. Koen: I have no objection.

[Check, March 16, 1950, $800, Isabel C. Massei to Heywood-Brummark, marked Defendant's Exhibit D.]

Mr. Koen: That is all, thank you.

EDWARD MASSEI, Sworn

Direct Examination by Mr. Koen.

Q. Your name, sir? A. Edward Massei.

Q. Where do you live? A. 29 Chrome Street.

Q. 29 Chrome Street? [341] A. Yes, sir.

Q. Worcester? A. Worcester.

Q. What is your business, sir? A. Printing business.

Q. How long have you been in the printing business? A. Since about 1935 or 1936.

Q. Are you a brother of the defendant? A. Yes, sir.

Q. Directing your attention, sir, to the year 1950, if I may, did you have a talk, a conversation, with your brother William, the defendant? A. Did I have a talk with him?

Q. Yes, with reference to your printing business. A. Yes, I did.

Q. What was the state of his printing business at that time, sir? A. What was the date of my printing business?

Q. The state, what was its condition, were you expanding it? A. Yes, I was.

Q. And because you were expanding the business, did you have a conversation with your brother? A. Yes, I did.

Q. As a result of that conversation, did you have a financial transaction with your brother? [342] A. I did.

Q. Tell us the nature of the transaction and the result. A. I asked him for a loan, for $4500.

Q. With what result? A. I received a loan.

Q. Did you receive the $4500 in currency or by check? A. By check.

Q. In connection with this loan of $4500, did you do all this talking with your brother William? A. Yes, I did, yes.

Q. I show you this document, sir. I ask you to examine it. I ask you if you have ever seen the original of which this is a photostatic copy? A. Well, I think that was the one, I am not sure.

Q. Will you turn to the reverse side of the check and see if there is an endorsement? A. Yes, that is mine.

Q. The endorsement appearing on the reverse side is your signature? A. That is right.

The Court: That is the check, isn't it?

The Witness: Yes, it is.

Q. The date of the check, please? A. November 30, 1950.

Q. Payable to whom? [343] A. Edward H. Massei.

Q. And the amount? A. $4500.

Q. And the signature of the maker? A. Isabel C. Massei.

Q. Endorsed by? A. Edward H. Massei.

Q. And beneath that is another endorsement. A. Antonio DiReda.

Mr. Koen: I am offering it without objection from counsel for the defendant.

[Check, $4500, November 30, 1950, payable to Edward H. Massei, by Isabel C. Massei, marked Government's Exhibit 32.]

Q. That check was dated November 30, 1950. As of December 31st, 1950, sir, had you repaid back that $4500 loan? A. I don't believe so, no.

Q. Had you paid any part of it back by the end of the calendar year 1950? A. I don't think so, no.

Q. Your father's name was what, sir? A. Pilade Massei.

Q. Pilade? A. Yes, sir.

Q. He died when? A. 1949, I believe, the beginning of 1949.

Q. February 2d, 1949? [344] A. I think that was it.

Q. Were you named in the will which your father left? A. I believe I was. I never checked it, but I believe I was.

Q. What, if anything, have you received from your father's estate in the way of a legacy or in any other manner? A. Half interest in a house at 29 Chrome Street.

Q. A half interest with whom, sir? A. With William Massei.

Q. That is the defendant? A. That is right.

Q. Did you receive anything else? A. There was $600 or $700 in a bank, an institution, I was trustee, you call it, and it was trusteed to me from my father.

Q. But you obtained that not by the will, but because it was in your name? A. I think that was it.

Q. As trustee for you, in his name? A. That is right.

Q. Other than the half interest in the house at 29 Chrome Street, did you ever receive anything of value from your father's estate? A. No, I did not.

Q. Whether it be real property or monies or securities? A. No.

Q. Nothing. Did you live at 29 Chrome Street with your father, sir. [345] A. Yes, sir.

Q. And for a number of years was your brother William also living at home with your father? A. He was living upstairs.

Q. When did he move upstairs, so-called? A. When he got married.

Q. And when, sir, did he get married? A. I don't really know. I think it was before 1935, anyhow.

Q. Would it have been at or about November, 1933? A. It could have been, yes.

Q. Was it, sir? A. What is that?

Q. Was it? A. I am not sure, I guess it was about that time.

Q. All right. Did his wife come there about 1933, sir? A. Yes, sir.

Q. And did she keep house for him there? A. Yes.

Q. Do you know whether she has been regularly employed since 1933, other than as a housewife? A. No, I haven't seen her working any place.

Q. Pardon me, sir? A. I haven't seen her working any place.

Mr. Koen: I think that is all.

[346] *Cross Examination by Mr. Maguire*

X-Q. How many children—

Mr. Koen: Just a minute, I was going to ask that. Does your brother have any children?

The Witness: No, he does not.

X-Q. How many children in your family, sir, the Massei family, that is, your father's family? A. Four.

X-Q. Who is the oldest, please? A. My sister, Anne Moretti.

X-Q. What is the difference in age between you and your brother, please? A. 20 years.

X-Q. What was the relationship of your father and brother? A. They were very close together.

X-Q. You were fairly described as a sort of kid brother? A. That is right.

The Court: You were close to him, your father was your father and you were his son?

The Witness: That is right.

Mr. Maguire: I didn't mean to imply, your Honor please, there was any disaffection between them.

The Witness: No, there was no disaffection.

X-Q. And this money that he loaned you in 1950, that

was to enable you to get some real estate to enlarge your printing business? [347] A. That is right, sir.

Mr. Maguire: That is all, thank you, Mr. Massei.

MARGUERITE WHITFORD, Sworn

Direct Examination by Mr. Koen

Q. What is your name, please? A. Marguerite Whitford.

The Court: Speak up loud, don't be nervous, take your time, speak up.

Q. Where do you live, Mrs. Whitford?

The Court: Let us have your name, first.

The Witness. Marguerite Whitford.

The Court: That is right.

Q. Where do you live? A. 11 Hillside Avenue, Pawcatuck, Connecticut.

Q. How do you spell the name of the town? A. P-a-w-c-a-t-u-c-k.

Q. In 1948, Mrs. Whitford, did you own some land in Westerly, Rhode Island, 1947, rather? A. Yes, sir.

Q. Pardon me? A. Yes, sir.

Q. Land owned by yourself and your husband? A. Yes, that is right.

Q. Did there come a time in 1947 when you sold— A. Yes, sir.

[348] Q. This land? A. Yes.

Q. I am wrong, 1949, wasn't it? A. I do not know when it was, the exact date.

Q. I am sorry, that looked like a 7, it is 1949? A. Yes, sir.

Q. To whom was the land sold, Mrs. Whitford? A. To Mr. Massei.

Q. Do you remember how many lots of land? A. No, it was just one.

Q. Just one. Do you remember the general dimensions of it? A. Well, approximately, I think 75 by 250, in that area, I am not positive.

Q. And how much money did you receive for the land? A. $800.

Q. I ask you where in Westerly the land was located? A. Shore Road, that is in East Pawcatuck.

Q. I ask you to examine that document. A. That is my signature.

Q. That is your signature? A. Yes, sir.

Q. On that document? A. That is right.

Mr. Koen: Without objection, I offer a certified copy of the deed from Alan O. Whitford and Marguerite D. Whitford to William V. Massei and Isabel C. Massei, covering a lot of land [349] in Shore Road in the City of Westerly, and a receipt signed by Mrs. Whitford, showing $800 received from William V. and Isabel Massei.

Mr. Maguire: From whom was the money received, please?

Mr. Koen: Yes.

Mr. Maguire: Why don't you read it, Mr. Koen?

[350] Q. Let me ask you this question first—

Mr. Maguire: May we have from whom it was received, please?

Mr. Koen: I will ask this question and then I will go forward.

Q. Who is M. Walter Flynn, described in this document? A. A lawyer.

Q. A lawyer for whom? A. For Mr. Massei, I believe. Yes.

Q. All right.

The Court: Did you talk to anyone about the purchase of this property? Just yes or no.

The Witness: Well, I don't know how to answer that.

The Court: Did someone come in and ask you did you want to sell the property?

The Witness: Yes.

The Court: Who was it?

The Witness: Mr. Massei called me.

The Court: Did you come to terms with him?

The Witness: Yes, sir.

The Court: As a result of which this property was sold for the price—

The Witness: That's right, in Judge Flynn's office. He made the transaction.

Q. See if I read this correctly, madam. That date is what? [351] A. January 15, 1947. Isn't that '47, or '49?

Q. That is what confused me. I think that "7" is a "9". A. It is a "9".

Q. January 15, 1949, received of M. Walter Flynn, $800 for sale of lot on Shore Road, Westerly, Rhode Island, to William V. and Isabel Massei, $800, Mrs. Margaret Whitford; is that correct? A. That's right.

[Certified copy of deed from Whitford to Massei, and receipt, marked Government's Exhibit No. 33.]

Q. Do you know whether or not the money which you received from Mr. Flynn, the lawyer, for Mr. Massei, was by check or in the form of currency? A. It was a check.

Q. Mr. Flynn's check? A. Yes, sir.

Q. And Mr. Flynn is now dead? A. Yes, that's right.

Mr. Koen: Thank you. I have no further questions.

Mr. Maguire: No questions.

Mr. Koen: You are excused, Mrs. Whitford. Thank you.

LELAND C. RICHARDSON, Sworn

Direct Examination by Mr. Koen

Q. What is your name, sir? A. Leland C. Richardson.

Q. Where do you live, Mr. Richardson? [352] A. 243 Wilson Avenue, Wollaston, Massachusetts.

Q. By whom are you employed, sir? A. John Hancock Mutual Life Insurance Company.

Q. In what capacity? A. I am an administrative assistant in the controller's department of the home office.

Q. Have you brought certain documents here today in response to a summons? A. I have, sir.

Q. Are the records you have kept in the ordinary and usual course of business of the John Hancock Life Insurance Company? A. They are, sir.

Q. Are they kept under your supervision and direction? A. Partly. Not completely, sir.

Q. The records which you have, are they records which were made at or about the date or the time which is reflected on them? A. Yes, sir.

Q. May I see them, sir? A. [Handing.]

[Mr. Koen and Mr. Maguire confer.]

Q. All right, sir. Directing your attention to the eighth day of August, 1945, do you have, as of that date, a policy of the John Hancock bearing number 0122669? A. I do, sir.

Q. May I have that policy, together with the supporting papers [353] that you have brought here today? A. [Handing.]

Q. Now, sir, there is a series of documents here? A. Right.

Q. Will you break them down in the order of their receipt by the John Hancock Company and describe them as they would be received in their order, culminating in the issuance of that policy that I have described? A. Well,

the first thing that would be required in order to issue an annuity contract such as this—

Mr. Koen: By the way, I'm sorry; did I offer these?

The Clerk: No.

Mr. Koen: I am now offering them in evidence.

Mr. Maguire: I wonder if we might have them described first?

Mr. Koen: I don't like to ask the witness questions about contents of the matter until they are introduced or offered in evidence and accepted because that is the usual procedure.

Mr. Maguire: Well, I have no objection to it. Some of these supporting papers, I don't know what they are, I have no objection to the policies. Possibly if he could describe them.

Mr. Koen: I will give you a chance to examine them, sir.

[354] [Brief pause.]

Q. Have you set the papers up in the order in which they would come into the possession of the John Hancock Mutual Life Insurance Company? A. Yes, sir, I believe I have.

Q. The first of such documents is what, sir? A. The application for the issuance of annuity contract.

Q. Application made by whom? A. The application was made by William V. Massei.

Q. And when was it made? A. August 8, 1945.

Q. From the application will you give us the information that appears on that? A. The name of the annuitant is also the applicant, William V. Massei, resident of 52 Oak Street, Westerly, Rhode Island. The beneficiary of record was Isabel C. Massei, wife, and the owner and holder of the contract was William V. Massei. It was a retirement annuity contract. The premiums payable for 10 years, to

mature on August 8, 1955, at which time there would be monthly annuity payments made of $55.35 a month.

Q. Payments made to whom? A. The payments would be made to William V. Massei.

Q. Is there something on that application, sir, that indicates the amount of money that was paid as a premium on this? A. Yes, sir, there is. In answer to a question has the premium been [355] paid, it is answered Yes, and the amount paid is given as $9,162.20.

Q. Now, sir, will you describe for us in layman's language what is meant by a retirement annuity? A. A retirement annuity, perhaps I might say there is a difference from life insurance. Life insurance is more or less payable on death. Retirement annuity, an individual contracts with an insurance company to purchase a contract that will provide, usually at a normal retirement date, a certain sum of money to be paid over a specified period of time and it required in this particular case that normally premiums would be payable for 10 years on an annual basis. That is, paid in to the company.

The Court: Normally what?

The Witness: This contract called for premiums to be paid annually for 10 years until the contract matured. Until August 8, 1955. The annual premium, incidentally, was $1,000. I failed to mention that.

Q. And when the policy matured or was to mature on August 8, 1955, sir, will you tell us what the amount of monthly income would be to the annuitant? A. At the time the contract was issued, the contract called for $55.30 a month to be paid, but there was a special agreement executed that changed the terms of the payments to be made.

Q. When was that executed? [356] A. On December 12, 1945, and that was executed by William V. Massei, stating that instead of the monthly annuitant payments specified

in said contract, the aggregate sum payable thereunder, together with any dividend accumulations thereon, if any there be, shall be paid at the rate of $200 per month to himself until the amount payable and interest accumulations at the rate of not less than 2-½ per cent per annum should have been exhausted, and the first payment shall be made on August 8, 1955 and any balance remaining on deposit of less than $200 shall be paid to the annuitant as a final instalment.

Q. So that there will be no misunderstanding, sir, getting back to the matter of premiums that you discussed, this $9,162.20 that was paid on August 8, 1945, was that the entire premium; that is, no payments were due on this policy after that; is that right? A. That's right.

Q. By Mr. Massei. A. That's right.

Q. That was his complete— A. That completed the payments for the 10 years.

The Court: Were the payments completed?

The Witness: Yes, sir.

The Court: When were they completed?

The Witness: They were completed at the time the policy was written and they were reported to the company from [357] our district office on an account dated September 4, 1945.

The Court: The money was paid then?

The Witness: That's right.

The Court: Instead of paying it over a term, it was paid in cash?

The Witness: Yes, sir, and there was a normal discount allowed, 2 per cent.

The Court: There was always a discount allowed, isn't there, if it is paid in cash?

The Witness: Yes, sir.

The Court: That is done because you are under a statutory obligation to do it?

The Witness: That's right, and one annual premium would have to be considered due. For instance, the first one is not subject to discount at all.

The Court: You don't mean to suggest to the jurors that the insurance companies give out something for nothing? [Laughter.] And that is as it should be.

[Discussion off the record.]

Q. What are these documents here, sir? Let's go back to the document you were handling before. As a result of that application was a policy issued? A. It was, sir.

Q. Is this the retirement annuity policy issued as a result of that application? [358] A. It is, sir.

Q. To whom was it issued? A. To the annuitant, William V. Massei.

Q. And the date? A. August 8, 1955.

Q. And it says commencing August 8, 1945. What does that mean? A. August 8, 1955. That means the date on which the monthly annuity payments would normally be made. That is considered the normal date of retirement.

Q. These here, sir? A. Two ledger cards. One represents the ledger card that we keep a record of each payment being made, reported to us through the agency accounts, and the other is a card made out to cover the various premiums that were also paid at that time.

Q. All right, sir. There is an attachment or a rider to the face of this document here. A. That's right, sir.

Q. This you have described to us before; is that right? A. I have, sir.

Q. That's the one that is entitled election of settlement option? A. That is the one where he changed the instalment to $200.

Q. This other document? A. That other document is a signed statement or authorization by William V. Massei stating that he hereby elected to direct [359] that at his death, or if his death occurred prior to the expiration of

the period from which any advance premiums are made, the balance of the premiums paid in advance, discounted in the same manner as received, shall be paid in one sum to my wife, Isabel C. Massei, if living; otherwise to my executors or administrators, and that was dated April 23, 1946.

Q. Now will you tell the Court and jury in layman's language just what the effect of that document is? A. Well, that meant that premiums had been paid and accepted by the company in advance but they were subject to return on demand of the annuitant at any time or, in the event of death they would become part of the proceeds of the policy, the contract, and he had made a special stipulation here how he wanted those to be paid as part of his request.

Q. Now the next document. A. That is a request for the surrender of this annuity contract.

Q. And was it surrendered as a result of that request, sir? A. It was, sir.

Q. When? A. It was surrendered on September 28, 1951.

Q. And what is this document, sir? A. That is a check representing the surrender proceeds of this contract?

Q. And the amount of that? [360] A. $9,406.74.

Q. Payable to whom? A. William V. Massei.

Q. And that is check No. 141820 of John Hancock? A. That's right, sir.

Q. And there is an endorsement on the reverse side reading what? A. Endorsed by William V. Massei.

Mr. Koen: I offer these documents in connection with policy No. 0122669.

[Bundle of insurance papers supporting Policy No. 0122669 marked Government's Exhibit No. 34.]

[361] Q. Now I direct your attention to the same date, sir, have you a policy there, No. 0125444? A. It is up there, I believe, somewhere.

Q. Will you give me the history on that, sir? A. This

likewise, of course, started with the completion of the submission of an application and as a result of the application, this annuity contract, also a retirement annuity numbered 0125444 was issued. This application was made out by William V. Massei, he was named as the annuitant and the address was 52 Oak Street, Westerly, Rhode Island. The benefactor was his wife, Isabel C. Massei. The owner and holder of the contract was named as William V. Massei.

There was a similar agreement made on this particular policy, changing the amount of the monthly annuity payments from the normal amount of $110.60 to $200 a month, providing the policy was continued in force until that period. The contract, I should say.

The Court: What was the date of that?

The Witness: The date of the policy, that was dated August 8, 1945.

Q. And was a policy issued as a result of that application, sir? A. Yes, sir, this was the policy.

Q. The type of policy? A. This was also a retirement annuity contract, payable for [362] ten years, similar to the other one. The annual premium was $2,000.

Q. And was there some money paid before that policy was issued, paid to the John Hancock Insurance Company? A. Not according to the records available here. According to the application, this Question No. 15, that read

"Has the premium been paid?"

It was answered, "No."

Q. At some time before the policy was issued, was some money paid? A. I cannot say that, sir.

Q. Do your records reflect—

Mr. Maguire: I would be very happy to agree that Hancock got paid before they got the policy.

Mr. Koen: I am trying to find out how much they got paid.

Mr. Maguire: What is the amount set forth in the application?

The Witness: Well, you mean he paid premiums under this contract in advance, as a result of the $2000 annual premium, the total amount paid was $18,505.96.

Q. When was that paid, sir, that $18,000-odd? A. That was on December 17th, 1945. That is reported to our Home Office, to our agency.

Q. Now at some time was this policy surrendered? [363] A. Yes, sir, it was, and also surrendered on September 28, 1951, and the proceeds of the surrender were $18,813.48.

Q. Payable to whom? A. William V. Massei.

Q. And the check number, if you will? A. Check number 141819, it was endorsed by William V. Massei.

Mr. Koen: I offer this group of documents in support of policy 0125444.

Mr. Maguire: No objection.

[Group of documents in support of Policy 0125444 marked Government's Exhibit No. 35.]

Mr. Maguire: Your Honor, may I ask that you instruct the jury that both of these policies do not fall within the years in question, and that they only go toward the starting point.

Mr. Koen: That is correct, sir.

Mr. Maguire: I don't think there is any doubt of that.

The Court: Please have that in mind, both of these policies are offered only for the purpose of getting a starting point, which I will explain to you rather fully later. You have to get a starting point here. They are not sums of money that are concerned with the taxable peried set forth in the indictment. Is that sufficient?

Mr. Maguire: Thank you, your Honor.

The Court: Thank you very much for having called it to my attention.

[364] Q. Now I direct your attention to Policy 0136620.

Tell us about that, if you will. What was the first document received and the date of it? A. This is an application for the issuance of a retirement annuity contract that was signed by the applicant William V. Massei and then also signed by Isabel C. Massei who became the annuitant under this contract.

Q. She was the proposed annuitant, is that right? A. That is right. And this is dated August 5th, 1946. The proposed annuitant was Isabel C. Massei, 52 Oak Street, Westerly, Rhode Island. The beneficiary was William V. Massei, husband, and the owner and holder of the contract was William V. Massei.

Q. Was there a premium paid on that, sir, and if so, when and how much? A. The answer to Question 15, "Has the premium been paid?" It was answered "No." Also, the amount paid was answered as "None."

Q. Subsequent to that, was a policy issued and was money paid before the policy was issued? A. There were premiums paid in the amount of $26,212.40 on August 13, 1946.

Q. Will you tell me the terms of that, sir, that maturity? A. I don't follow you, sir.

Q. When the policy matured. A. When it matured, I am sorry.

Q. Yes. [365] A. The date of the issue of the contract was August 7, 1946, and then there were 15 years to be paid on it. Under the normal course of events it would normally retire or become a retirement annuity on August 7, 1961. The annual premium under this policy amounted to $2000, and would have provided a monthly annuity payment of $131.60.

Q. Was there an election of the settlement option filed in that, too? A. There was, and it was dated August 5th, 1946, signed by William V. Massei, similar to that on the other annuity contracts, stating that the amount of the

monthly annuity would be $200, until the funds were exhausted.

Q. You testified, sir, that $26,212.40 was paid on August 13th. Is that the date? A. August 13th.

Q. 1946? A. Right, sir.

Q. Is that what is known as a single premium payment? A. No, sir. That is, a single premium payment would be one payment for a single premium annuity contract. The difference between the two is that the single premium annuity contract, because of the fact it is all paid in one amount, there is, well, a difference in the cost to begin with and on a discount basis, these premiums are subject to demand by the annuitant at any time, so they have to be available.

[366] Mr. Koen: Well—

The Court: It is cheaper, you get it cheaper.

The Witness: A single premium is cheaper.

The Court: As I understand, now, gentlemen, please, I don't want to—you better come up, I don't want to make this statement in the presence of the jury for fear I might cause prejudice.

[Conference at the bench as follows:

The Court: Those two policies are offered for the specific purpose, that is, you predicate your claim, he was worth whatever the amount was, $60,000, I have been trying to get this roughly, I think you said at the opening time, it was the claim of the Government he was worth $60,000, those two policies—

Mr. Koen: They were included in that figure.

Mr. Maguire: That is right.

Mr. Koen: Let me get this across, they have been telling me down there [at the counsel table] some of the figures in the opening may be $5,000 off.

Mr. Maguire: They were supposed to be paid off, in the opening, your Honor—

The Court: I want to have the jury get that.

Mr. Koen: Just let me say, whatever the [367] opening net worth, whatever the starting point net worth on 12/31/45 might be tabulated or compiled or computed by the agents, it will include those policies that were purchased in 1945, that starting point figure will include the value of these two policies.

The Court: I mean these two policies are at least a part of the basis upon which you predicate in the Government's claim, he was worth $60,000.

Mr. Koen: At the starting point, yes.

The Court: May I state that to the jury?

Mr. Koen: Yes.]

[End of bench conference.]

The Court: So there will be no misunderstanding, ladies and gentlemen of the jury, I have refrained from doing that which I usually do, as you go along with me you will find in the trial of the ordinary case I will enunciate a principle which I feel will sort of beacon light the pathway. I do that because that was the policy put in operation by the man whom I consider to be the ablest judge I have seen sit in this court, that is the late Judge Hugh McClellan. I tried many cases under him. I had an opportunity to observe the clarity with which juries understood his point of view. I have tried to adopt it.

So that I am going to, I have talked to counsel, they have confirmed my point of view that I have, these first two policies are policies which are offered in connection with the [368] opening that Mr. Koen made. Of course that is not evidence. You will remember he said that at the beginning of the net worth period, so-called, the time that the tax period would start, there was a claim of the Government, and I am not saying it is so, please don't misunderstand me, that he was worth $60,000. Am I correct in that, is that correct?

Mr. Koen: Yes, and whatever his net worth was, it includes the two policies this gentleman testified to.

The Court: Whatever his net worth was, the first two policies were included and not this last one. Is that it?

Mr. Maguire: Yes, just that you reiterate it is the Government's position.

The Court: I said that, don't misunderstand me, Mr. Maguire. I said it was only done predicated on the theory, the claim of the Government, it is only evidence, that is all.

Mr. Koen: I am afraid I made a poor choice of phrase when I said "single payment".

Q. Do I understand from your testimony that $46,000-odd which was paid by Mr. Massei to the John Hancock Company was the only payment that he made before the issuance of this contract and the only one he would be required to make? A. That is right, sir.

Q. That is what I thought, single payment meant. Now, sir, you have the documents in order. Tell us what those are. A. Well, this contract was also surrendered on September 28, 1951, [369] and there was a check issued to Isabel C. Massei, dated September 28, 1951, in the amount of $27,273.50, and the check number was 141817, and that was endorsed by Isabel C. Massei.

Mr. Koen: I offer these documents.

Mr. Maguire: The same objection, if your Honor please.

The Court: That is right.

[Policy 0136620, August 5, 1946, marked Government's Exhibit 36, with supporting papers.]

Q. Now directing your attention to April 12, 1950, sir.

The Court: Will counsel come up a minute.

[Conference at the bench.]

Q. Do you have a policy, sir, as of April 12, 1950, bearing the number 0207737? A. I do, sir.

Q. Will you give us the history on it, sir, in much the same manner as the last three? A. This policy was issued

as a result of an application dated August 8, 1950, completed by and signed by Isabel C. Massei, as applicant, also named as the proposed insured,—the proposed annuitant, I am sorry. The address was 52 Oak Street, Westerly, Rhode Island. The husband was the beneficiary, William V. Massei, and that question regarding the payment of premiums, what amount has been paid in advance as the first premium, that was answered None.

This contract was also a retirement annuity contract with, in the normal course of events eleven annual premiums to [370] be paid, to mature on April 12, 1961, with a monthly annuity of $126.30. The amount of the annual premium was $3,000.

[371] Q. And was there a payment, a one-time payment, of a premium before the issuance of that policy? A. There was, sir.

Q. Was that the only payment of a premium required, sir? A. After that payment, that's all we required.

Q. That was the first and the last? A. Right.

Q. And the total amount of that single premium? A. $29,947.80.

Q. Was that policy surrendered or retired? Surrendered? A. That policy was surrendered for its full value or cash value on September 28, 1951 and I have a check made payable to Isabel C. Massei in the amount of $29,027.49, check No. 141816 dated September 28, 1951, and was endorsed by Isabel C. Massei.

Mr. Koen: I offer these documents, sir.

Mr. Maguire: Same objection.

The Court: That's right.

[Bundle of insurance papers supporting Policy No. 0207737 marked Government's Exhibit No. 37.]

Mr. Koen: Will your Honor pardon me for a moment?

[Brief pause.]

The Court: How many annuities were in operation when that policy was cashed in?

The Witness: I don't know, sir, I couldn't tell you. You are talking about in this particular case?

[372] The Court: Yes.

The Witness: They were all cashed at the same time.

The Court: Was this last one for $29,000?

The Witness: The amount of premium, yes, sir.

The Court: And the others, those were separate amounts?

The Witness: Yes, sir.

Mr. Koen: I have no further questions of this witness, your Honor.

The Witness: Are you interested in the total value?

The Court: Yes, I would like to have the total amount. What is it?

The Witness: The total surrender value of the four policies, the contracts, as they were surrendered on that date, amounted to $84,521.21.

Cross-examination by Mr. Maguire

X-Q. On this last policy you are talking about, the surrender value was less than what they paid for it? A. That is true, sir.

The Court: That was because you cashed it in before it had gone a certain time; isn't that right?

The Witness: That's right, sir.

X-Q. For instance, what I want to get at is in that last policy you are talking about, that is the one Mrs. Massei bought in 1950? [373] A. That's right.

X-Q. Who was the applicant, please? A. The applicant was Mrs. Massei.

X-Q. Who was the annuitant? A. The annuitant was Isabel C. Massei.

X-Q. Who was the owner of the policy? A. The owner was Isabel C. Massei.

X-Q. And to whom, when the policy was cashed in, to whom was payment made? A. Isabel C. Massei.

Mr. Maguire: That's all.

The Court: Where is the check?

Mr. Koen: It is in evidence, sir.

The Court: Could I see it, please?

Mr. Maguire: I think he has it, sir.

The Witness: I'm sorry. [Handing to the Court.]

The Court: What are the endorsements on that and the stamps, in the light of your experience?

The Witness: Well, the bank, there is a stamp that says First National Bank of Boston. It looks like October 12—

The Court: Was it cashed?

The Witness: I would say so.

The Court: Do you see where it says "Teller"?

The Witness: Yes, it says "9 Teller 1".

The Court: That would indicate it was cashed?

[374] The Witness: Yes, sir.

The Court: It wasn't deposited?

The Witness: No, sir.

The Court: All right.

Mr. Koen: I have no more questions.

Mr. Maguire: Just one. May I see the other checks, please?

The Court: I will be very happy to see that they are passed back to you.

X-Q. This is a check dated September 28, 1951 in the amount of $9,406.74? A. Yes, sir.

X-Q. As his Honor asked you, looking at that again, does that indicate it was cashed?

The Court: I didn't ask him about that one.

Mr. Maguire: I know you didn't, if your Honor please, but I wanted to.

X-Q. Does that indicate it was presented for payment in cash at The First National Bank?

Mr. Koen: What was that question again?

The Court: Does that indicate it was presented to be cashed.

The Witness: Instead of deposited.

The Court: That's right.

X-Q. Will you answer that question? [375] A. I said it would indicate that it was cashed.

X-Q. Will you examine another check dated September 28, 1951 to William Massei in the amount of $18,813.48? Does the stamp on the back of that indicate it was cashed and not deposited? A. It does, sir.

X-Q. Will you examine check dated September 28, 1951 in the amount of $27,273.50? Examine the stamp on the back as to whether it was cashed or deposited. A. That would be cashed, sir.

The Court: Those were all cashed in 1951?

The Witness: Yes, sir.

The Court: About the same time, weren't they?

Mr. Maguire: The same date, if your Honor please, September 28.

X-Q. So that there was some $84,000, as you totaled, picked up in cash by the Masseis on that date? A. I would say so.

X-Q. By cash, you mean dollar bills? A. Yes, sir. It might be—

The Court: It might be what?

The Witness: Might be larger amounts than dollar bills. I don't know.

The Court: They were, probably. I shouldn't imagine —what Mr. Maguire meant, it was currency?

Mr. Maguire: That's right, yes, sir.

[376] The Court: Are you through, Mr. Koen?

Mr. Koen: Yes I am, sir, for the day.

The Court: Now, I think we will call it a day. I want to have about five or 10 minutes with these attorneys, and inasmuch as this will be a long weekend, I have other matters, otherwise, I would go on on Monday, but I am the emergency Judge and I have a full schedule Monday on other matters so that I am going to suggest to you you go home and get a lot of relaxation. These are comforting days and let's hope they continue to be that way. Enjoy the beautiful spring air and refrain from discussing the case with any of the members of your family because in a case like that you will be doing a great disservice to your sovereignty and a great disservice to the defendant and you would be doing a great disservice to the United States of America. Keep your mind free from prejudice of all kinds and try to just—you won't have any difficulty in remembering the details next week and while you are basking in the sunshine of laughter and song and recreation I will have plenty of work ahead of me. I wish you all a good weekend and I hope that, God willing, I will see you all Tuesday morning at 10 o'clock.

[Adjourned to Tuesday, April 10, 1956.]

[377] SIXTH DAY

Court Room No. 5,
Federal Building, Boston,
April 10, 1956.

The Court: Good morning, Mr. Foreman and Ladies and Gentlemen of the Jury. What I wanted to say to you is this: I was reading over some of the daily transcript and I am perfectly satisfied that possibly I may have had you misunderstanding me. I say it without any desire to be repetitious, but fully cognizant of the fact that in the recreational periods of the day and night I certainly

enjoy looking at the newspapers because they are a media of information and people like one paper and some people like to read another, and usually I purchase several papers because one represents one philosophy and the other represents another philosophy, and I frequently purchase three, so that I can be current on the viewpoints that other people have, and that is what creates our free society.

Therefore when I suggested that in the absence of—as a matter of fact I went over it considerably with the attorneys before you came down and, as I said the last time, I have a great deal of confidence in the members of the Fourth Estate, as I call them, and they follow in the footsteps of some wonderful men that have gone to their reward. I have had very fine friendship with the newspapermen and the editors, and [378] with the managers and the editorial writers, and at times over the years they have disagreed with me and they have written editorials praising me and they have written editorials criticizing me. I have never questioned their right to do that. I wouldn't want to have you feel you shouldn't buy the papers and read them to your heart's content.

What I will suggest you do is this: Sort of have a little bit of a blackout program, if there is something about the case. Just pass it over because, with all due deference and respect for these wonderful men and women on the newspapers, sometimes you pick up the paper and you will read a story of a trial of a case and frequently I scratch my head and say to myself, "I don't remember that; I don't think it happened." And that indicates the frailties of human nature.

There was a great professor of philosophy at one of the great colleges in Boston, and he took a group of students into a crowded section in Boston and let each one of them observe for about two or three minutes, describing the course of vehicular travel and what took place, and then

he had each one write down his observations. No one was the same as the other. They were in substantial accord but different on different details.

[Discussion off the record.]

[379] So that when you read the paper, don't—please continue to read the papers. I didn't say that you shouldn't. But try to refrain from reading stories about the trial. As I say, the public is entitled to be informed, and newspapers have certain rights and privileges, and everyone knows that I certainly try to protect them. If you are going to stop, interfere with fundamer al rights in a free society, we are going to have trouble. I didn't mean to say you shouldn't read them. Read them to your heart's content. But when you see anything in the paper about tl is trial, my suggestion is blot it out.

Now is counsel satisfied? There is no objection to it, is there?

Mr. Koen: Yes, there is, sir. Just one objection. I hope the remarks you have made will not convey to the jury and counsel for the defendant—this discussion you had was not with me but was rather with the United States Attorney himself.

The Court: Oh, yes. No, I mean—you mean was with you, and I referred to you as the United States Attorney? Is that what you mean?

Mr. Koen: Your remarks indicated you discussed the general matter with the United States Attorney.

The Court: You are the United States Attorney. So is Mr. DiMento.

Mr. Koen: I had no discussion with you on this subject.

The Court: As a matter of fact, Mr. Koen, it's a [380] singular thing, I don't use the term Assistant. The United States Attorney is the representative of the Attorney General under the Federal Code, and he has all the powers and privileges of the Attorney General, subject to two

conditions, two conditions subsequent. First, that he can be suspended or fired, to use the ordinary expression, by the Attorney General; secondly, that the United States Attorney himself can recommend suspension. But when I speak about the United States Attorney, I mean his representative. When an Assistant United States Attorney comes in here representing the United States Attorney in this court room, he has all the powers and privileges of the Attorney General of the United States and speaks for him. That's in keeping with our representative form of government. That is what I meant when I used the phrase United States Attorney. I wouldn't want anyone to feel, Mr. Koen, I am saying anything which would reflect in any way upon the great respect that I have for the United States Attorney. I have great respect for the office, an office that I am fond of, and I have respect for the personnel and respect for the fine lawyers there. But don't feel disturbed over that.

[381] You are the United States Attorney acting in behalf of Mr. Julian.

I wanted you to know I read the transcript and I was afraid you got the idea you shouldn't read the papers. It read that way, and someone missed a few lines in what I said. That's all right. I want you to read the papers just the same. I don't want to be accused of trying to reduce the circulation of the Boston or suburban papers.

All right, Mr. Koen.

JOHN L. BIANCHI, Sworn

Direct Examination by Mr. Koen

Q. What is your name, sir? A. John L. Bianchi.

Q. Where do you live, sir? A. 419 Grafton Street, Worcester.

Q. And your profession? A. Lawyer.

Q. How long have you been a member of the bar? A. Since 1922.

Q. Some time, as an attorney, did you represent Pilade Massei? A. Pilade Massei was my uncle and I represented him back in 1939 when I made out his will.

Q. Did there come a time, sir, when you offered that will for probate? A. I probated his will and stopped there. I got the appointment [382] as executor of his will and that is as far as I went. I filed no inventory and the case was in abeyance, as far as it is now.

Q. Did you, sir, as the executor of the estate, make a survey or investigation to determine what the assets of the estate were? A. I did not.

Q. Do you know what the assets of the estate were? A. I know of a three-tenement house.

Q. Do you know of anything else of which Mr. Massei died possessed in 1949? A. I know that he possessed a three-tenement house and that's all.

Q. With reference to the special or direct bequests that are recited in the will as you drew it, sir, have you made any distribution in connection with those directives of the deceased? A. No, sir.

Q. As the executor of the estate did you ever come into possession of any monies— A. No, sir.

Q. —belonging to the deceased, for the purposes of distribution? A. No, sir.

Q. Did you ever come into possession of securities? A. Of what?

Q. Securities? Stocks or bonds of any type of nature? A. No, sir.

[383] Q. Well, sir, in view of what you said, outside of the three-family house is it your statement that as executor of the estate no other properties of any sort or description came into your possession, as the executor of that

estate? A. Nothing that I know of, outside of that three-tenement house.

The Court: As executor you would know, wouldn't you, because that is your job?

The Witness: Well, if your Honor please—

The Court: No, no, no.

The Witness: Yes.

The Court: That's right.

The Witness: It was my job but no one came back to me to talk about it after the appointment.

The Court: But you still continued to serve as executor; is that right?

The Witness: Well, I am the executor of this estate. I have done nothing on it since the appointment.

Q. Have you filed any inventory, sir? A. No.

Q. Have you filed an account of any sort? A. Any what?

Q. Account. A. No, sir.

Q. Did you, sir, about 1939 prepare a mortgage for Mr. Massei? A. I don't remember it, sir.

[384] Q. Did you, in 1939, represent Mr. Massei, and by "Mr. Massei" I mean the gentleman who died in February, 1949. A. The only thing that I remember is the will. He came in the office and told me what he wanted done.

Mr. Keen: I have no further questions.

Cross-examination by Mr. Maguire

X-Q. Mr. Bianchi, you are related to Mr. Massei? A. Yes, Mr. Massei was my mother's brother.

X-Q. And he wandered into the office one day in 1939 and had you draw his will? A. That's right.

X-Q. You were named as executor? A. That's right.

X-Q. Upon his death you probated the will? A. I filed it in Probate Court in Worcester.

X-Q. From there on you had no further discussion of the matter with any of the Massei children? A. Well, I was

appointed executor by the Court but from there on I had no further communication from any of the children.

The Court: If you were appointed executor of an estate, isn't there a corresponding obligation upon you, whether you are a civilian or lawyer, to gather together the assets of the estate and file an inventory? Isn't there a statutory obligation?

The Witness: That's correct, your Honor, but no one—

[385] The Court: That's all right.

X-Q. Mr. Bianchi, as far as you were concerned, this was more or less a family affair?

Mr. Koen: Objection.

A. That's right.

Mr. Koen: Objection.

The Court: I will exclude that. The jury may disregard the last question and answer.

Q. What is the relationship between William Massei and his father, Mr. Bianchi?

Mr. Koen: Objection.

The Court: Well, will you come up?

(Conference at the bench:

The Court: What is it you want by that?

Mr. Maguire: What I want to bring o', if your Honor please, is that the defendant William Massei is very close to his father; that his wife, in effect, did the housekeeping for the father during the father's latter years; that the relationship was such that he would be the one of the four children on whom the father relied. He was the older boy, 20 years older than his younger brother.

The Court: How can he answer that? He would only be giving an opinion.

Mr. Maguire: He knows of his own knowledge. He [386] is related to the family.

The Court: He said the man came in his office and asked him to draw a will and he drew it.

Mr. Maguire: He certainly knows, being related to the family, knows the relationship between the son William and the father.

The Court: You object to it?

Mr. Koen: I object to it, yes, sir, on several grounds.

The Court: What are they?

Mr. Koen: First of all I do not see the materiality or the competency. I think the question asks for a conclusion and opinion of this gentleman, and thirdly I think it delves into a matter which was not covered on my direct.

The Court: I think I will exclude it and save your objections.

Mr. Maguire: I will make what I have just stated by way of an offer of proof, your Honor.

The Court: That's right.]

Mr. Maguire: No more questions, Mr. Bianchi; thank you.

Mr. Koen: All right, sir, you are excused.

Mr. Ierardi.

[387] DOMENIC A. IERARDI, Sworn

Direct Examination by Mr. Koen

Q. Your name, sir? A. Domenic A. Ierardi.

Q. Where do you live? A. 96 Anawan Street, West Roxbury, Massachusetts.

Q. By whom are you employed? A. The Intelligence Division, Internal Revenue Service, Boston, Massachusetts.

Q. How long have you been connected with the Intelligence Division? A. 19 years and one month.

Q. Directing your attention to the eighth day of Novem-

ber, 1951, sir, did you meet, in connection with your official duties and with particular reference to the tax matter of the defendant William Massei, did you meet a Mr. Garrity? Yes or No. A. Yes, sir.

Q. Did you have some conversation with Mr. Garrity? A. Yes, sir.

Q. Was Mr. Garrity alone or was he accompanied by another? A. He was alone, sir.

Q. Did you meet Mr. Garrity on the next day, sir? A. Yes, sir.

Q. And at that time was he alone or was he accompanied by another? [388] A. He was accompanied by another.

Q. And the other person, please? A. Mr. William Massei.

Q. Did you have some conversation with Mr. Garrity at that time at which Mr. Massei was present? A. Yes, sir.

Q. Will you tell us, please, sir, what that conversation was? A. The conversation—

Q. If you can't remember the exact words, will you give us the substance of it? A. The substance of the conversation—

Mr. Maguire: If your Honor please, I would like just as close to the exact words as possible. In other words—

The Court: I am sure Mr. Ierardi will. I will give you full opportunity to cross-examine. All a person can do is to give his best memory of what took place and obviously —would you ask him if he saw him in connection with the official work of his office?

Mr. Koen: All right, sir.

The Court: I will refrain from asking questions.

Q. Will you tell us, Mr. Ierardi, if the meeting with Mr. Garrity and Mr. Massei on that date was in the performance of your official duties? A. Yes, sir.

Q. And was it in connection with the matter which in-

volved the [389] present defendant, Mr. Massei? A. Yes, sir.

Q. Now will you tell us what the conversation was? A. The conversation had to do with a proposition whereby Mr. Garrity wanted to avoid publicity as was given in recent cases in Worcester and for that purpose he had contacted me the day before to see whether or not arrangements could be made to—

Q. May I interrupt you, there, sir? I'm sorry; go ahead. I thought you had finished. A. —arrangements could be made to avoid such publicity.

Mr. Maguire: If your Honor please, will you hear me at the bench, please? I wasn't aware of the nature of this conversation until now, or at least I think I know what he is going to talk about and I don't think it is relevant.

The Court: Again I know you say that in good faith, but the one that determines—I don't know what it is.

Mr. Maguire: I appreciate that.

The Court: If I had any knowledge of what these witnesses were going to testify to, I hardly think I would be qualified to sit in the trial of this case. I wouldn't sit in a case where I knew what witnesses were going to say; I would disqualify myself. I don't know anything more about it than you do. You have a right to come to the bench at any time, and so does Mr. Koen or Mr. Di Mento.

Mr. Maguire: Well, I would like to come to the bench [390] now, if your Honor please.

The Court: Certainly.

[Conference at the bench:

Mr. Maguire: Your Honor, this apparently—perhaps Mr. Koen had better state what it is, but so far as he has gone, this has to do, I believe, with the posting of some $80,000, which was done in order to avoid a jeopardy assessment. This is in 1951.

Mr. Koen: That is part of it.

Mr. Maguire: As far as that part of it is concerned, if your Honor please, I think it has absolutely nothing to do with the years under indictment. This is two years, I believe, after the last indictable year.

Mr. Koen: No, no.

Mr. Maguire: One year?

Mr. Koen: It is within the next calendar year following.

Mr. Maguire: In any event it is beyond the years with which we are concerned and I don't think it has any bearing in his case at all.

Mr. Koen: This—

The Court: What else is there?

Mr. Maguire: I don't know what else, your Honor.

Mr. Koen: Let's stay on that for the moment. This evidence has to do with the disposition of the $84,000 [391] cash—I am talking approximate figures now—which was received by the defendant as the result of the surrender of the annuities and this conversation and this action is within a matter of a couple of weeks, as I remember the dates, when the policies were surrendered.

Mr. Maguire: This is all beyond the statutory period. That is what we are concerned with, your Honor. I don't see it has any bearing.

Mr. Koen: I think it indicates several things, may it please the Court. Government's Exhibit 36, may it please the Court, indicates that the policies, the annuity policies, were surrendered as of September 28, 1951. Checks have been introduced in evidence reflecting the payment to the annuitants. Evidence has been offered that on the 1st of October these four checks, totaling some $84,000 or $85,000 were cashed. Were cashed, not deposited, were cashed.

The Court: That's right.

Mr. Koen: Now here it is on November 8th or 9th following—

The Court: What date was that, did you say?

Mr. Koen: The 1st, October 1.

The Court: Now you are on November 9th.

Mr. Koen: That's right. Now, I think the question [392] is proper and I think the answer is admissible on several aspects. I think the cashing of the checks and the retention of the money indicates many things, but among other things it indicates a consciousness of guilt. I think that the proffer to the Bureau of Internal Revenue indicates the frame of mind consistent with the actions of one who knows that there is a tax liability outstanding, and I offer it for those purposes, among others.

The Court: Let me say this. It is your position an attorney, whether he goes into the office in Boston or goes to Washington and talks to somebody in the Attorney General's office or the Civil Division or the Penal Division, and he discusses compromises and adjustments of taxes, that that is admissible as evidence of a guilty conscience?

Mr. Koen: These statements were made in his presence—

The Court: It doesn't make any difference. It is clear they were made upon the advice of counsel.

Mr. Maguire: This clearly has to do with the civil side of this, your Honor. It is beyond the period with which we are concerned. It has nothing to do with the matter at hand.

Mr. Koen: It has to do with another aspect and I [393] am going back to the original conversation on the 8th. The conversation on the 8th with Mr. Garrity at which this meeting was set up. Mr. Garrity made certain statements—

Mr. Maguire: Was the defendant there?

Mr. Koen: I am not particularly concerned about that because Mr. Maguire then makes a statement, as I understand it, which indicates an intent and an—as an intent to do certain things and says that on the morrow he will discuss this matter and then certain other things eventually happened.

Mr. Maguire: It is strictly on the civil side, your Honor. It has to do with the deficiency alleged, and so forth. It has nothing to do with the matter at hand.

The Court: Is it your position every time a lawyer walks into the United States Attorney's office and discusses matters that affect his client's guilt or innocence, you can put an assistant on the witness stand and let him testify to it?

Mr. Koen: No, but when a man operates under a power of attorney as the representative of that man, as the agent and the representative, that places it in a different category, particularly when the purpose is to speak for and get information from the Treasury [394] Department which would not otherwise be made available to a third person, because there are both criminal and administrative sanctions preventing a discussion.

[395] Do you think any subdivision of the United States Government—I am not saying whether it is so or not because it is one of the problems bothering me—do you think that any subdivision of the United States Government, where a man is under investigation, for the purpose of trying to detect, to arrest, to try, and to punish him for violation of a penal statute, where he seeks comfort and solace from the advice of a lawyer,—that the United States Government, as a condition precedent to his practicing before that department can draw a sweeping power of attor-

ney which is an interference, it might well be argued is an interference with his fundamental rights?

Mr. Koen: No, because this is a different proposition.

The Court: I haven't seen this power of attorney.

Mr. Koen: It is in the Treasury Department.

The Court: Why does the Treasury Department have any greater power than any other department?

Mr. Koen: Because the provisions of the United States Code—

The Court: Gives them the right to set up regulations; isn't that right? The regulations [396] have got to be reasonable?

Mr. Maguire: That is right.

Mr. Koen: Will you let me finish, please?

The Court: Certainly.

Mr. Koen: As you very well know, the provisions of the Internal Revenue Code prohibit any employee in the Intelligence Department from discussing or revealing the contents of any person's income tax situation under penal sanctions, and there are regulations to that effect which subject employees to administrative sanctions, and unless a power of attorney is filed, the agents cannot discuss with a representative of the taxpayer and certainly wouldn't want to talk to the taxpayer.

Mr. Maguire: Your Honor, may I suggest—I apprehend we are going to get into this very shortly—that we dispense with this witness, with the approval of Mr. Koen, and put on evidence he has which doesn't bear on this problem? I know he has some—Mr. Merano.

Mr. Koen: No, I am going to excuse Mr. Merano.

The Court: What I thought was this—

Mr. Koen: I have a right to try my case in my own way.

[397] The Court: That is right; and it is the Court's corresponding right to exclude the testimony or admit it.

Mr. Koen: That is right.

The Court: That's right. I can certainly do that. I have to rule on it. What I have in mind, I never remember a case which ever came up in my memory—and that is why I try to get citations and briefs—where an attorney for a person under investigation was—well, what he said to somebody in the Government service was taken, was admitted as a part of the formula by which issues of fact are presented to a jury. That is what bothers me. Yet, I can understand why it is so. I don't know what the procedure is. I think Mr. Maguire's request that we proceed to take evidence—I understood you to say you would use up all your other evidence and then we would pass upon it.

Mr. Maguire: That is what I thought.

The Court: But the question that bothers me is not that. I have before me the admissibility of this money and what it was used for. Suppose it was—what did you call it—a deficiency assessment? Didn't you call it that?

Mr. Koen: No, I didn't call it that.

[398] The Court: Well, it was the payment of something, wasn't it?

Mr. Maguire: Presumably it was set up, your Honor, as a suspense account with respect to tax liability that might be assessed.

The Court: That's right. Is it your position that money set up as a suspense account under circumstances where temporarily at least I have to take judi-

cial notice of the fact that the man has income and the statute has tolled on it, that the civil responsibility still runs? If it is, then there is no such a thing as the statute running. They can sue any time.

Mr. Koen: That's right.

The Court: If that is so, what I have to be careful of is this: that I have to show more than, or the excess above the amount that person earns, I have got to show probable sources of income which come within the orbit of what you would call income. I mean apart from ifs and things, apart from a bequest under the terms of a will. I haven't got to show that. If this payment was made, wouldn't it be just as susceptible as a payment in anticipation of adjusting difficulties with reference to a period before—wait a minute, [399] wait a minute. The tax wouldn't have been as large as that, $80,000, if it was before that.

Mr. Koen: I'm not concerned with that.

The Court: I'm only concerned with its admissibility and the fact that it is— I tell you what I would like to have you do. I would like to think this over. I don't want to settle it now. Will you excuse him and go ahead with some other witness?

Mr. Koen: Well, with the next witness we're going to be in much the same area, your Honor, because the next witness is Mr. Hurst, the special agent who investigated this case and will testify to the meetings that he had with Mr. Garrity. He will testify that he observed a power of attorney.

The Court: Well, that's all right.

Mr. Koen: Then with that we will lay the foundation—

The Court: Didn't you in your opening say, if that is the agent—I don't know whether you named

him or not—that the defendant with Mr. Garrity present had some conversation with?

Mr. Koen: Yes.

The Court: That is admissible.

Mr. Maguire: That is a horse of a different [400] color.

The Court: No, no, I mean that is admissible, and I understand you to say you were going to offer it in evidence. You were going to have the witness testify that he told—if it is Mr. Hurst—he told the Government agent that this money came to him from sources.

Mr. Koen: The exact words I think were "from many people."

The Court: "Many people." You will agree that is admissible?

Mr. Maguire: If it is relevant, your Honor, of course.

The Court: When you get into the question of what constitutes an act which comes within the orbit of actual authority from the client to disclose confidential communications—let's use it that way—communications to a third person, then I think I will have to receive some—I think you are within your rights to show what the power of attorney is, and you are within your rights to show what the condition precedent was, and you are within your rights—obviously, of course, a lawyer goes with his client and in his presence says something, or if the lawyer says it with the [401] client there, obviously that is admissible.

Mr. Maguire: That is right.

The Court: There is no doubt about that. I'll

admit that. The thing that bothers me is the admissibility of this—you see, what you are doing, Mr. Koen, you are asking me to admit that those $85,000 arrangements were made to turn it over and put it in the suspense account,—in other words, to put it at the disposal of the United States Government as the ultimate they would get, was in the nature of an act that constituted a consciousness of guilt.

Mr. DiMento: I think you misunderstand what Mr. Koen has said, Your Honor. Maybe he didn't say it as perhaps he should have. The consciousness of guilt was not the paying over of the money to the Internal Revenue.

The Court: What was it?

Mr. DiMento: But the cashing of annuities of $84,000.

The Court: That has already gone in.

Mr. Maguire: Yes.

The Court: That has already gone in. We don't need to go into that.

Mr. DiMento: It is in evidence. It would [402] seem to me it is relevant as to what happened to that money afterwards, and if Mr. Maguire can successfully argue that that is favorable to his client—

The Court: Do you regard that as evidence of consciousness of guilt? I am not going to say that to the jury. I don't construe that as that. I think I know what consciousness of guilt means pretty well. I think it is admissible to show how much money he had but not his consciousness of guilt. If this jury should find,—for example, suppose you bring it within the Addonis case. I have read that carefully. If you read the other cases, no one knows exactly what they

mean, thoroughly. I know the Supreme Court had to wrestle with the proposition and they did come out with something, and I think that the opinion of Justice Clark in the Holland case is a fine opinion, but where you go from it, I don't know, because there are many rivulets that were present, and I say that without any criticism of the court because they are never settled and they can't be settled by any court, because no court can cover every angle. They do their best, the same as we all do. They are not divinely inspired. [403] Mr. DiMento: Your Honor, there is a further purpose for this testimony. We have here a taxpayer who was the subject at the time of investigation.

The Court: That's right.

Mr. DiMento: Who comes in with an attorney, which indicates, which is some evidence along with other evidence which we expect to introduce, that the attorney represented him before the Internal Revenue Service.

The Court: I think that's so.

Mr. Maguire: There can be no dispute about that, your Honor.

The Court: I think that is right, Mr. DiMento. I don't find any fault with that—I really don't.

Mr. Maguire: There is no dispute that Mr. Garrity represented him at the time.

The Court: There is no dispute he did. The only problem I have is the problem of admitting this evidence of the payment of $84,000, turning it over to the Government as a suspense account predicated upon the basis that is evidence of a guilty conscience.

Mr. DiMento: No, your Honor, that is not [404] the evidence.

The Court: What is?

Mr. DiMento: The original cashing of the annuities.

The Court: But that is already in.

Mr. DiMento: Yes. That is our evidence of consciousness.

The Court: Suppose, for example, that Mr. Koen argues to the jury that was evidence of a guilty conscience and that counsel for defendant objected and I didn't correct it, what do you think would happen to me? That is a step in the procedure by which he shows he had money. Those sums of money came to him after December 31, 1945; but under the Holland case they say that is not enough, you have got to go beyond that. Then they try to chart a course, and Judge Hastie was able to supply another rivulet. By the way, did that case go to the Supreme Court?

Mr. Maguire: I don't think so.

Mr. DiMento: Which?

Mr. Maguire: The Adonis case.

The Court: Did they seek certiorari?

Mr. Koen: I don't find any record.

The Court: I didn't, either.

[405] Mr. Maguire: No, I don't think so.

The Court: That is, I couldn't find it. The other one came down in 1954. This came down in 1955, and here we are in 1956.

Mr. DiMento: Your Honor, you touched upon it already. I think we ought to mention we have here a situation where the defendant has admitted through his attorney to taking bribes.

Mr. Maguire: Wait just a minute, Mr. DiMento.

Mr. DiMento: I mean, this is the only evidence.

Mr. Maguire: Wait just a minute.

Mr. DiMento: I felt this way, your Honor. Sup-

pose we introduce evidence the defendant admitted taking bribes from 1921 through 1943, namely, he admitted taking bribes for some 24 years. Then he remains on the Police Department, which is some evidence of his continuing to take bribes.

The Court: No. That Holland case doesn't allow that.

Mr. Maguire: That is right.

The Court: That is the trouble with it. There is a lot of force in which you say. I don't want to suggest the avenues, the line of thought that obtains. I know what they are. I can [406] appreciate them. They are not as clear, and they are not on your side, Mr. Maguire, as you think, because they are there. There they are. As I remember it, Mr. Koen in his opening said the defendant said he got the money from that tavern in his father's estate. Didn't you say that? Didn't you say that?

Mr. Koen: No, sir.

The Court: Where did I get that idea?

Mr. Maguire: I think it is by virtue of what Mr. Koen said about his conference with Mr. Isber.

Mr. Koen: That's right. That's the source of it.

The Court: That is right. Now, Mr. Koen, if that evidence is admissible, and I certainly am going to have it heard—I am not going into any long hearing.

Mr. Maguire: It doesn't have to be.

The Court: You indicated you would be able to enter into a stipulation as to what it was. You would then have your rights protected if I admitted it. That's where my difficulty lies, and that's why I have always been in favor of giving the Government a right of appeal. It makes it [407] much easier. I always believed in it. It puts an onus on the judge. However, that's his job. Now, if there is evidence that

isn't so, that is evidence of the denial of a material fact, that's the test, which is evidence of a consciousness of guilt. The basis upon which you have consciousness of guilt is a set of circumstances which contradict the main highway of truth, or an assertion such as you had in the Adonis case, then an investigation to show that what he said wasn't true.

Mr. DiMento: There is evidence that he got nothing from his father's estate except the half interest in a 3-family house.

The Court: Well, the only thing before me now is the admissibility of that conversation.

Mr. Maguire: That is correct.

The Court: Is there anything else that this witness is going to testify to at this point?

Mr. Koen: Yes, your Honor.

The Court: What is that?

Mr. Koen: The effect of this testimony will be twofold.

The Court: No, I mean what else is he going to testify to?

Mr. Koen: Let me finish. It will show, [408] first, that Mr. Garrity represented this defendant, that this arrangement, whatever it was, was made as a result of a conference with Mr. Garrity and the agent, in which Mr. Garrity said that Mr. Masseci was going to be in his office tomorrow morning and he would then execute a power of attorney. Now that conversation, I say is admissible.

The Court: I am going to hear it outside of the jury because as to what Mr. Garrity may testify is a question of law, it is not a question of fact. Now, testimony as to whether Mr. Garrity was the actual agent of this defendant is a question of law. It is not for the jury. I have to rule on it. I think you will

agree with me. There is no question about it. As to admissions only.

Mr. Koen: That's right.

The Court: It's a question of law. I must say I am not going to exclude it. I'm not saying I am going to admit it. I have my own idea. I have given it some study and we have done some research work ourselves.

Where it appears a power of attorney is filed—you are going to show what that is. I'm going to have the testimony about that power of attorney heard in the absence of the jury, and [409] while I shouldn't be hurried, I would like to have it accelerated.

Mr. Maguire: I certainly will do that.

The Court: No need of hearing any witnesses, I'm not hearing any witnesses. I am going to have it cited as a matter of law; then if it becomes a question of credibility between witnesses, let the jury settle it.

Mr. Maguire: I don't think there will be any question of credibility.

The Court: That's right. The fact I admit it isn't evidence that I consider it to be true. The weight of it is for the jury. It is not for me to pass upon. How long will this take?

Mr. Maguire: I would think half an hour.

The Court: All right. I want to take a recess anyway. Why isn't it a good idea to settle it now?

Mr. Koen: I think it is.]

The Court: [To jury] I tell you what I think I'll do. I have some very, very important questions of law to settle. Now please, I beg of you, Mr. Foreman and ladies and gentlemen of the jury, this is the beginning of your term of rendering wonderful service, and this case is no different in principle than the other cases. Frequently, and it's the very essence of [410] good judgment on the part of counsel to come up here, and if they didn't come

up, I would invite them up because if I allow something to go in, whether it's a civil case or whether it's a criminal case which is prejudicial—and I can make mistakes. Every judge has been upset because he has done that, see. But I have learned a lesson from all this, and the safer way to do is to have lawyers come up here and then we'll weigh the questions from the viewpoint of admissibility, that is, from the viewpoint of receiving it or not receiving it. Then the question of law is settled and then the evidence is admissible.

Now what I want to say to you is this. Because the Court admits evidence does not carry with it the violent conclusion that therefore it's correct.

[411] That would be an invasion upon your own sanctuary. That is your obligation. It is a question of fact for a jury. The determination preliminarily, in a good many cases, as to the admissibility of a piece of testimony, very properly so, imposes upon a court to have what they call a voir dire examination, and all that means is this: that the jury will be excluded so they won't be prejudiced and the evidence is received under circumstances where there will be no publication of it. It is a matter exclusively for the Court. Then if it is admitted, you will receive it and the newspapers have a right to publish it or not, as they see fit, and I know the members of the press will understand that if I heard this in open court with everyone listening, and there might be some publication of it, that would do violence to the rights of the sovereignty of the United States and to the rights of this defendant, and I haven't any desire to cause any disruption of those precious rights, and that is exactly what they are. They are very precious; they are the foundation stone of orderly government and they spell the difference between abodes of peace, where men live and let live, and disorder. You would have might and the rule of the jungle instead of

the rule of simple law, which is the rule of plain horse sense, that's all. When you go out this way it doesn't mean I am trying to keep anything from you.

Whether it is in this case or any other case, there is no indication on the part of the Judge of this court—that [412] does not have from the Court the imprimatur, the kind of force that would have you saying, "Well, it is admitted; therefore, it is true." That would be wrong, that would be offensive to your rights because you are the ones that settle that.

So I am going to excuse you now. You can come back at 12 o'clock. I have some doubt as to whether or not we will be finished and I am not going to limit you, now. Go ahead. It is very important both for the government and for you, Mr. Maguire. Haste makes waste, and I don't want to have it in the trial of cases. I will let you go alone and I suggest you refrain from coming into the courtroom, that you all go downstairs and have some coffee.

[The jury retire.]

The Court: Will counsel come up?

[Conference at the bench:

The Court: Where do you want to hear this? I have got to settle two or three things. First, I have to determine whether or not this evidence is admissible on the theory of actual authority. I didn't say express authority.

Mr. Maguire: I understand, your Honor.

The Court: The government is entitled to offer to show a course of conduct which the government says is the basis for the admissibility of it. Now, I can hear this in open court or I can hear it in the lobby. [413] The trouble is, if I hear it in open court, there will be publication—

Mr. Maguire: That is the trouble with it.

The Court: It is for the protection of the government not to have it heard in open court.

Mr. Koen: What do you mean, it is for the protection of the government, your Honor?

The Court: Because if it is published beforehand and I should exclude it and you had enough evidence to go to the jury and they know nothing about, it, then they can't say—

Mr. Koen: I didn't follow that at all, Judge. I'm sorry.

The Court: Suppose I exclude this testimony—

Mr. Koen: After an open voir dire?

The Court: That's right, and let's assume I let it go to the jury as a modicum of evidence, all I have to find is that there is a modicum of evidence, whether it is direct evidence or circumstantial evidence, a modicum of legal evidence, it is my obligation to let a case go to the jury. There are many ways that a defendant can protect himself. There is one very important way here, but it is my obligation to do that. If I did do that and this defendant was found guilty, and then I gave no further relief to the defendant, I [414] think you all know what I mean, and it went to the Circuit Court of Appeals, the Circuit Court of Appeals would say what I did in effect was to hear this evidence, which was inadmissible, in open court, allowed it to be published in the papers when I could have stopped it, and therefore they would send it back for new trial, which I think is very proper.

Mr. Koen: A voir dire simply means a hearing of questionable evidence in the absence of the jury.

The Court: All you want is to get the evidence and find out whether it is admissible.

Mr. DiMento: It doesn't look right, your Honor.

The Court: Anything in my court room looks all

right, Mr. DiMento. Let that be recorded on this record for all times. I live with my conscience in these things and I am going to do the things I think I should do. I am going to hear the question of admissibility of this evidence without the presence of anybody.

Mr. Koen: You are aware sir, that the defendant is entitled to a public trial.

Mr. Maguire: The defendant is not pressing. The defendant, in effect, asks that the hearing be in chambers.

Mr. Koen: You have no authority to say that, Mr. [415] Maguire. The defendant has to say that.

The Court: If you placed that interpretation every time I bring lawyers up to a bench, a man isn't getting a public trial.

Mr. Koen: Of course he is.

The Court: I am going to rule on the admissibility of it. You would have headlines and everything. I am disposed, on the basis of the power and everything else, to admit—I can't help it. I have to sit as a Judge and I am not to pass on whether or not it is the thing to do. I already expressed my opinion in the lobby. I assume what Mr. Koen says is true, that as a condition precedent to practicing before the Treasury Department you have to have a card.

Mr. Maguire: It is power of attorney, I think—

The Court: You have to have a card first.

Mr. Maguire: All that does, if your Honor please, is demonstrate you presumably have reasonable qualifications.

The Court: But that card is a card which carries with it the imprimatur of an obligation on the part of anyone practicing law before the Treasury Department to observe all the rules. I assume that Mr. Koen is going to show regulations that were promulgated.

I haven't read them for a long, long while.

[416] Mr. Koen: I have the regulations here, sir. I will ask you to take judicial notice of them and their contents.

The Court: You are not going to object to those regulations?

Mr. Maguire: Far from it, sir. We have something we would like to point out to you, too.

The Court: I will let you do that. Mr. Koen won't object to my taking judicial notice of whatever the regulations are. That is understood.

Mr. Maguire: Definitely.

The Court: So that I have to pass upon the admissibility of this, the weight of it, and it isn't a comforting thing for a judge to do because I understand the relationship of client and attorney, but if you have a power of attorney and a course of procedure by which as a condition precedent to handling cases you have to subscribe to a rule of chalk, and if there is that power of attorney which gives the attorney the right to speak on matters of fact—I am not talking about matters—for example, if I may use the word advisedly, because you used it, or someone did, I don't think Mr. Garrity did but you did, a contention.

Mr. Maguire: That's right.

The Court: I am familiar with that case. They [417] are not talking about a contention. What Mr. Koen, as I understand, is going to offer is evidence of a conversation, isn't that right, that Mr. Garrity had with Mr. Isber in connection with the subject matter before this Court; isn't that right?

Mr. Koen: Yes, and in addition to the conversation that he had with Mr. Isber, there was a conver-

sation that he had in Westerly, Rhode Island, with Mr. Hurst and the—

Mr. Maguire: That is with the defendant present?

Mr. Koen: That's right.

Mr. Maguire: If it is relevant, your Honor—

Mr. Koen: Wait a minute.

The Court: Suppose that conversation—here is Mr. Hurst. He wasn't having the conversation with Mr. Hurst personally. He was having the conversation with Mr. Hurst in his official capacity as a representative of the United States Government—what it is I don't know—to which the defendant, as I understood, remembering your opening, made some statements, is that right, in the presence of Mr. Garrity, who was his lawyer?

Mr. Koen: Mr. Massei made some statements to Mr. Hurst, and in the presence of Mr. Massei Mr. Garrity made similar statements, or the same connotation.

[418] The Court: If that is so, Mr. Maguire, obviously the course of conduct under these decisions can constitute a set of circumstances where you have authority to speak. I am using careful words.

Mr. Koen: At the point where I was interrupted, sir, when I was discussing the conversations that Massei and Garrity had, both with Hurst and with Isber, I will also have Mr. Hurst testify as to a course of conduct by Mr. Garrity, as the result of which Mr. Garrity gave to Mr. Hurst information in connection with the man's history and background, financially, over a period of some 10 or 12 months, which information could have come from only one source, the Masseis. Course of conduct over a period of a 12 or 14 months, I don't know the exact length of time.

The Court: Are you going to show he didn't tell the truth about that?

Mr. Koen: Who?

The Court: That Massei didn't?

Mr. Koen: You didn't follow me, sir. This course of conduct which was followed, predicated originally on his statement to Ierardi that he was going to have Massei in to file a power of attorney. Hurst will testify he observed the power of attorney. We will show that the document presently can not be found. [419] Then I will show these conversations, and then I will show a course of conduct by Garrity, with documents submitted, letters submitted, containing information about the financial history and background of this man, together with other information and the course of procedure is consistent with one who represents.

Mr. Maguire: May I say for the record there is no doubt in the world that Mr. Garrity represented the defendant as an attorney at law—

The Court: What I think I better do—

Mr. Koen: Wait a minute, may it please the Court. Mr. Garrity, if he represented this taxpayer at all, represented him in accordance with the provisions of the Treasury Regulations because under the Treasury Regulations—

Mr. Maguire: The burden is on the government to establish his power.

Mr. Koen: It does not have to be an attorney at law, it can be an accountant or any other individual whom he might choose to delegate the powers to.

The Court: I want to hear the actual story.

Mr. Koen: What bothers me is this: They say on the one hand Mr. Garrity represents this defendant and on the other hand they object to anything consistent with the representation.

[420] The Court: I want to hear it. Let me hear the story you put in and then I am going to rule. The time has come now for me to rule. You are getting ready to put Mr. Isber on, aren't you?

Mr. Koen: Not right now. I am going to put Mr. Ierardi on and Mr. Hurst, and if you want Mr. Isber on the voir dire, then I will put him on. I have excused him until 12 o'clock.

The Court: I am not going to go into the merits of it. If I put Mr. Isber on, I would have to hear Mr. Garrity. I want to hear the position of the government and the position of yourself on the basic question as to whether, as a matter of law, whatever Mr. Garrity said on the theory of actual authority to speak—isn't that the question before me?

Mr. Di Mento: That is the question.

The Court: Where will we hear it?

Mr. Di Mento: You are going to have the defendant present, aren't you, your Honor?

The Court: As a matter of fact, you don't have to have a defendant present. If this defendant walked out of this court room today and didn't show up for the rest of the term, I could still try the case. You can do it in every case except treason and murder, as I understand those rules. You don't need them. Do you [421] waive the presence of the defendant?

Mr. Koen: I request the presence of the defendant, your Honor.

Mr. Maguire: I think he probably ought to be there, your Honor, just to sit and listen. It is very important to him, as you can imagine.

The Court: Let's go inside and hear it.

Mr. Maguire: May we start, if your Honor please—

The Court: Let's take a recess for 15 minutes.

Mr. Maguire: Quarter of 12?

The Court: I will excuse the jury until quarter past two.

Mr. Di Mento: Couldn't we just as well close this court room, your Honor?

(Discussion off the record.)

The Court: If you will waive the question, Mr. Maguire, of public trial or you won't raise that question, I will exclude the public and hear this in this court room. I think it is the safest way to do it. Do you agree to that?

Mr. Maguire: I think that is better, your Honor.

The Court: We can receive it openly and then I will ask the witnesses for the government—I am going to suggest—

Mr. Di Mento: Your Honor, I would suggest that [422] the defendant be asked personally whether he makes that waiver.

Mr. Maguire: Mr. Di Mento—

Mr. Di Mento: Well—

Mr. Maguire: You have got some of the strangest theories of law I have ever heard.

The Court: His counsel says so.

Mr. Di Mento: I am just citing the Himmelfarb case which is quoted in their own brief which says serious constitutional rights can be waived only with the express consent of the defendant.

Mr. Maguire: What are you talking about?

The Court: Regarding the right to go on without the public.

Mr. Maguire: I will ask him that.

Mr. Koen: I think he should state that himself.

The Court: You go down and talk to him and have him state it.

(Brief pause.)

Mr. Maguire: Your Honor, the specific exclusion, excluding the press and the public, meets with the approval of the defendant.]

Mr. Koen: May I ask the Court to question the defendant?

The Court: I don't question Mr. Maguire for a minute.

[423] Mr. Maguire: May it appear in the record, your Honor, I had stated—

The Court: He has already taken it.

Mr. Maguire: That was stated loudly enough so that the defendant heard what I said.

The Court: Mr. Massei, Mr. Maguire has stated to the Court that you waive any constitutional right or other right that you may have in connection with the suggestion of an open trial where the public is admitted under circumstances where we are hearing some testimony or hearing some statements made in connection with the admissibility or non-admissibility of evidence. Mr. Maguire says you waive that fully; is that right?

The Defendant: Yes, sir.

The Court: Is that satisfactory?

Mr. Koen: Yes, sir.

The Court: All right, let's take a recess.

[Brief recess.]

[424] PROCEEDINGS ON VOIR DIRE

The Court: I just made the statement that the only evidence, the only thing I am going to hear now is the question as to whether any statements made by the defendant through his attorney, Mr. Garrity, were made under circumstances that make that testimony, that evidence admissible. Do I need to hear any testimony? Do you think I need any testimony to hear this?

Mr. Koen: I would think so, sir. I do not know how else the matter could be decided.

Mr. Maguire: I would think so, if your Honor please. In addition to this question of competence, your Honor, you have the question of relevancy, too, and materiality.

The Court: Well, I know, I understand the question of relevancy and the question of materiality. If I find that Mr. Garrity was acting as the agent in these talks under circumstances where the evidence is admissible, I am going to admit it. It's weight is for the jury, and I'm going to do it.

Mr. Maguire: We would like to be heard on that point, if your Honor please.

The Court: I have already read your briefs, and we have been over it, and I'll save your rights on that. I will permit you to make a statement if you would like to make it, and I won't call you down. If Mr. Koen feels he has to have his testimony— You understand what I mean, Mr. Koen?

Mr. Koen: I think I do. What I am going to show, [425] and tell me if I am wrong, what I intend to show is a course of conduct between Mr. Garrity and Mr. Hurst, Mr. Hurst being a Special Agent, which would—

The Court: This [indicating] is Mr. Hurst?

Mr. Koen: That is right. —which would indicate that Mr. Garrity at all times represented this defendant in his tax matters.

The Court: All right. Now let me ask you this. Can you agree, or can the Court take judicial notice of certain regulations of the Treasury Department?

Mr. Koen: I would like to have you take judicial notice of the regulations.

The Court: Let's get those first. I understand, Mr. Maguire, at the bench you did not object to that and you are to call certain other regulations to my attention?

Mr. Maguire: That is correct.

The Court: And I am going to permit you to do it. You do not object to these regulations having full force and effect that are in proper legal form, and you are going to cite some and Mr. Koen doesn't object to those being read.

All right, Mr. Koen.

Mr. Koen: I am going to call to your Honor's attention certain excerpts from Prentice-Hall Federal Tax Service, and I am now reading from Vol. 2 of the 1951 edition with reference to conference and practice requirements: Section 21269 of that volume, 21270, 21271, 21273, which, if I may, will give the [426] volume to your Honor to read from.

The Court: No, you can read them into this record, Mr. Koen.

Mr. Maguire: May I ask are these Treasury Regulations?

Mr. Koen: Yes, sir.

Well, at Section 21269, may it please the Court, has the general title of Qualifications for Conference.

It provides:

> "Conferences may be accorded only to taxpayers or their duly authorized representatives. Any individual taxpayer may appear on his own behalf or in behalf of a member of his immediate family if such appearance is without compensation; and a member of a partnership, executor—"

and so forth, all of which do not apply to this particular situation.

> "This rule also applies to an individual, a partnership, an estate or trust, or a corporation with respect to the liability of the individual, partnership, estate or trust, or corporation as a transferee of property of a taxpayer and to a fiduciary . . . . All other persons appearing as attorneys or agents, including attor-

neys or agents of transferees or fiduciaries, must exhibit evidence that the requirements of Department Circular [427] No. 230, which contains the statutes and regulations governing practice before the Treasury Department, have been complied with and also must conform with the following requirements."

And that refers back to Part 10 of that volume which is entitled "Department Circular No. 230 Laws and Regulations Governing the Recognition of Agents, Attorneys and Other Persons Representing Claimants before the Treasury Department and Officers Thereof."

"21270. No attorney or agent representing a claimant or other person before any of the offices of the Bureau of Internal Revenue shall appear or be recognized in any case, matter, claim, or other proceeding or business pending in such office unless the attorney or agent representing the claimant presents and files a power of attorney, or a certified copy thereof, from his principal in proper form, authorizing him to prosecute the case, claim, or matter in question. Such power of attorney shall always be filed and evidence of enrollment submitted before such attorney or agent is recognized. In the event, however, that an attorney or agent presents himself for conference who is not familiar with this requirement—"

I think we can agree that has no application here.

[Mr. Garrity makes a statement which is not heard by [428] the reporter.]

Mr. Koen: Now, may I say this?

The Court: I didn't get that last.

Mr. Koen: May I say this, may it please the Court?

The Court: I didn't get the latter part.

[Mr. Garrity starts to speak again.]

Mr. Koen: Now, please? I object, may it please the

Court. If this is an entering wedge by Mr. Garrity to anything in this court, I object.

The Court: Yes, that's right.

Mr. Koen: He's not counsel here—

The Court: That's right.

Mr. Koen: —for the purpose of this indictment here.

The Court: I think that is fair. I think if Mr. Garrity has anything to say he ought to say it to you, Mr. Maguire. Then you can say it.

Mr. Koen: I have refrained from remarking about his presence at conferences at the bench.

The Court: I tell you, Mr. Koen, I have not heard the remark, but whatever it is, it may be stricken so that no harm be done. I don't know what he said. I was going to ask Mr. Martin—

Mr. Koen: I object to his remarks in any form of words at this stage of the proceeding.

The Court: I was going to ask Mr. Martin to read it [429] as long as I didn't hear it so that you could—

[The reporter stated he did not hear all of it, only just the last part.]

The Court: It is agreed that what Mr. Garrity said may be stricken out. Go ahead, Mr. Koen. Mr. Martin didn't get it anyway; he got a part of it. I didn't hear any of it. Go right along. Go ahead, Mr. Koen.

Mr. Koen [reading] "In the event, however, that an attorney or agent presents himself for conference who is not familiar with this requirement, or who can show that he has not had reasonable opportunity to obtain a power of attorney from his client, or who has not applied for enrollment, but is able to produce such evidence as will reasonably convince the Bureau's representative that he has authority to represent the taxpayer, such attorney or agent may be heard with the understanding that a power of attorney in proper

form and evidence of enrollment will be promptly forwarded to the Bureau, and that until such power of attorney and evidence of enrollment shall have been filed information will not be disclosed to such attorney or agent relative to the Bureau's attitude in respect of the issues or to any other matter relating to the taxpayer's case."

[430] The Court: Now may I interpose, Mr. Maguire, to ask this, and I want you to know I am only doing it for the purpose of clarifying something which apparently is correlated to the question that Mr. Koen asked—not the question, but the assumption that he made. I suppose we can agree that Mr. Garrity, Arthur Garrity, Attorney Arthur Garrity, had a card to practice before the Internal Revenue Service. Is that right?

Mr. Maguire: I believe that Mr. Garrity doesn't in fact know, your Honor, but he assumes so; in other words, his memory is at that time he isn't sure whether he had one or not.

The Court: Well, he couldn't practice unless he did.

Mr. Maguire: Well, apparently—well, I am not sure. I think we may fairly assume at that time it was a requirement. I don't know, your Honor, but I think we can assume for the purposes of this hearing that he did.

The Court: That he did have a power of attorney. All right.

Mr. Maguire: That he had a treasury card.

The Court: That he had a treasury card; and that at the time he did appear he was acting as counsel for Mr. Massei.

Mr. Maguire: That is correct. Really, attorney at law.

The Court: Attorney at law, acting as counsel for Mr. Massei, and was there for the purpose of representing him professionally.

[431] Mr. Maguire: Correct.

The Court: Go ahead.

Mr. Koen: As the agent and representative in the tax matter then pending? I think the statement was made that there was—

The Court: Well, you have read that statute that he was there as attorney, and as attorney obviously under certain circumstances he occupied the same position as any other agent, except there is a certain amount of privilege that runs to what a lawyer is told, and I understand your position there. That is one of the questions I have to settle.

Would you read that section, Mr. Koen, over again, that you just read about the agent, what he has got to do to represent someone?

Mr. Koen [reading:] "No attorney or agent representing a claimant or other person before any of the offices of the Bureau of Internal Revenue shall appear or be recognized in any case, matter, claim, or other proceeding or business pending in such office unless the attorney or agent representing the claimant presents and files a power of attorney, or a certified copy thereof, from his principal in proper form, authorizing him to prosecute the case, claim, or matter in question. Such power of attorney shall always be filed and evidence of [432] enrollment submitted before such attorney or agent is recognized. In the event, however, that an attorney or agent presents himself for conference who is not familiar with this requirement, or who can show that he has not had reasonable opportunity to obtain a power of attorney from his client, or who has not applied for enrollment, but is able to produce such evidence as will reasonably convince the Bureau's representative that he has authority to represent the taxpayer, such attorney or agent may be heard with the understanding that a

power of attorney in proper form and evidence of enrollment will be promptly forwarded to the Bureau, and that until such power of attorney and evidence of enrollment shall have been filed information will not be disclosed to such attorney or agent relative to the Bureau's attitude in respect of the issues or to any other matter relating to the taxpayer's case."

[433] "21,271. *Power of attorney to be filed prior to final determination of tax liability.*—No power of attorney will be accepted which is filed after final determination of the tax liability,—"

"21,723. *Power of attorney requirements.*—

Any power of attorney offered in evidence in any case will be accepted only if it is in regular form. Only one power of attorney shall be in effect in any case and there shall be included in such power of attorney the names and addresses of all attorneys or agents to whom the taxpayer has delegated authority to represent him.

It is considered necessary in all cases that the power of attorney contain language to convey the principal intention, though not necessarily in strictly legal form.

The power of attorney must be executed before a notary public, or, in lieu thereof, witnessed by two disinterested individuals. The notarial seal must be affixed unless such seal is not required under the laws of the State wherein the power of attorney is executed. No attorney or agent as notary public shall take acknowledgments, administer oaths, certify papers, or perform any official act in connection with matters pending before the Bureau in which he is employed as [434] counsel, attorney, or agent, or in which he may be in any way interested.

The authority delegated to an attorney or agent in

a power of attorney enumerating certain specific acts which may be done will be considered limited to those acts.

Express authority to do the following acts must be granted and shown in the power of attorney or such acts will be considered beyond the scope of the agent's authority:

1. To receive but not to endorse and collect checks in settlement of any refund. (See Section 3477 of Revised Statutes, which prohibits assignments of claims or portions thereof, and title 'checks in payment of refunds,' Paragraph XXI herein.

2. To delegate authority or to substitute another agent or attorney.

3. To execute consents agreeing to a later determination and assessment of taxes than is provided by statute of limitations.

4. To execute closing agreements relative to the tax liability.

The power of attorney should be signed as follows:

a. In the case of an individual taxpayer, by [435] such individual.

b. In the case of any taxable year for which a joint return was made by a husband and wife, by both husband and wife, except that either spouse may sign for the other if duly authorized in writing so to act."

There is a balance of the subdivision which applies to partnerships and corporations and associations which I believe has no standing here.

Subdivision F of that paragraph:

"*Certain powers of attorney to be filed in field offices.* Powers of attorney covering income, profits,

estate, and gift tax cases, also Vinson Act cases, shall be filed in the office of the internal revenue agent in charge of which the case is under consideration, accompanied by sufficient authenticated copies thereof for attachment to the return for each tax year under consideration.

Fee statements respecting contingent or partially contingent fee agreements required to be filed by attorneys and agents and agents under the provisions of paragraph (y), section 2, Department Circular No. 230, revised, effective October 1, 1936, as amended should be signed only by the attorney or agent and filed with the internal revenue agent having the case under [436] consideration."

Pardon me, just a minute, sir. [Brief pause.]

The Court: I suppose, Mr. Maguire and Mr. Koen, that when an attorney appears in behalf of a taxpayer in a division of the Treasury Department, that comes within the purview of the work of special agents, who represent the police department of the Treasury setup, and when he does that, he does it for the specific purpose of professionally trying to convince or to prevail upon the authorities so that they will not institute or cause to be instituted criminal proceedings against his client. No doubt about that, is there?

Mr. Maguire: No, your Honor.

The Court: You agree with me that is so?

Mr. Koen: I do.

The Court: And you do, Mr. Maguire?

Mr. Maguire: I do.

The Court: Of course it is also obvious if he does do that, he has to come there, and no one would suspect a man of Mr. Garrity's probity would do anything except to speak the truth, that he would have the facts upon which to predicate his claim.

Mr. Maguire: I would also like to say—.

The Court: That is so. There is no dispute over that statement. He wouldn't go in and deceive the Bureau. He would say what he did say, with a background of truth.

[437] Mr. Maguire: It is true with respect to facts but he can well go there to make a legal argument.

The Court: That's right. I am not talking about a legal argument.

Mr. Koen: May I call your Honor's attention to the provisions of 5 U.S. Code 261 providing that the

> "Secretary of the Treasury may prescribe rules and regulations governing the recognition of agents, attorneys, or other persons representing claimants before his Department, and may require of such persons, agents and attorneys, before being recognized as representatives of claimants, that they shall show that they are of good character and in good repute, possessed of the necessary qualifications to enable them to render such claimants valuable service, and otherwise competent to advise and assist such claimants in the presentation of their cases. And such Secretary may after due notice and opportunity for hearing suspend, and disbar from further practice before his Department any such person, agent, or attorney shown to be incompetent, disreputable, or who refuses to comply with the said rules and regulations, or who shall with intent to defraud, in any manner wilfully and knowingly deceive, mislead, or threaten any claimant or prospective claimant, by word, circular, letter, or by [438] advertisement."

And following that there was issued and promulgated Circular No. 230, portions of which I have read to you, and the portions which I think that, at this time, are pertinent to this hearing.

May I call to your Honor's attention that portion of the

regulation dealing with the scope of practice before the department, which is Subdivision (b)

> "*Scope of practice before the Department.*—Practice before the Treasury Department shall be deemed to comprehend all matters connected with the presentation of a client's interests to the Treasury Department, including the preparation and filing of necessary written documents, and correspondence with the Treasury Department relative to such interests. Unless otherwise stated the term 'Treasury Department' as used in this paragraph and elsewhere in this part includes any division, branch, bureau, office, or unit of the Treasury Department, whether in Washington or in the field, and any officer or employee of any such division, branch, bureau, office, or unit."

I think that generally, may it please the Court, those are the matters that I wish to call to your Honor's attention at this time.

The Court: Let me ask you this: Have you got a copy [439] of a power of attorney?

Mr. Koen: I do not have it, sir.

The Court: I mean a copy of the form that is used.

Mr. Koen: There is a form prescribed but it is for information—let me put it another way. There is no official form, as such. There is a suggested form, only.

The Court: I thought they had to file a power of attorney of some kind.

Mr. Koen: They have to file a power of attorney.

The Court: Have you got a copy of that?

Mr. Koen: Of which?

The Court: Of what a lawyer files.

Mr. Koen: As I say to you, sir, there is a suggested form. The department does not provide official forms.

The Court: Was there a form that was in operation in this district at the time?

Mr. Koen: Issued?

The Court: Was in operation? A form that was being followed?

Mr. Koen: There is no requirement other than that which I read to you previously. Under 21,273, the heading of which is "Technical language unnecessary"

> "It is considered necessary in all cases that the power of attorney contain language to convey the principal's intention, though not necessarily in [440] strictly legal form."

The Court: Was it the custom and practice to have a power of attorney executed? Have you got a form that was used? I understood it was the contention of the government up here at the bench that there was a power of attorney that was executed but it has been lost.

Mr. Koen: That's right.

The Court: Have you got a form? There must have been a form that was used. Have you got that form?

Mr. Koen: My understanding is that it was a form that was prepared by Mr. Garrity, not by the department or the Bureau. Prepared by him and submitted by him after it was executed by the taxpayer, and of course if there is a copy in existence it would be only in the possession of one person. The original was lost.

The Court: Well, we will leave it this way, that there was no form, the substance of the power of attorney was not predicated upon any form that was set out in print or put out by the Treasury Department to be executed by the taxpayer and to show an authorization to speak in behalf of him or to act in his behalf.

Mr. Koen: Agents and their representatives were on their own to file a power of attorney that satisfied the requirement which said that no technical language was necessary.

The Court: And the powers of were never the same,

they were all different powers filed by different lawyers?

[441] Mr. Koen: I think the draftsmanship depended on the individual who was submitting it, yes.

The Court: Does that in substance cover what you, Mr. Koen, desire to convey to me as the sections of the rules that you say are applicable to the present question before me?

Mr. Koen: I think those are the ones for the moment, anyway, sir.

The Court: Now, Mr. Maguire, have you got some sections you want to read?

Mr. Maguire: If your Honor please, as I understand the law it is the government's burden to establish the agency or the authority—

The Court: No. Have you got any sections you want?

Mr. Maguire: Yes, when Mr. Koen, in effect, has rested I have some sections of the Code and possibly some other evidence I would like to introduce.

The Court: I am not going to hear much evidence on this, I am going to rule on it.

Mr. Maguire: Very good.

The Court: You can make an offer as to what the witnesses are going to say and you can do it with reference to this witness.

Mr. Maguire: Do I understand that Mr. Koen has rested in behalf of the government in proving the authority of Mr. Garrity to act in this matter?

[442] Mr. Koen: Wait a minute, please.

The Court: I would like to have you call to my attention the relevant sections of the rules you feel are applicable. I want to complete the job now so we won't have it put in piecemeal.

Mr. Maguire: This is reading, your Honor please, from the same Circular No. 230 that Mr. Koen has been reading from. It is subsection E, "Certification of copies of powers

of attorney and evidence filed in connection therewith." It is along in the same section you were reading from.

> "The certification of copies of powers of attorney or papers or documents filed in connection therewith must be made by a notary public, or other proper official, who should state that he has personally compared the copy with the original and finds it to be a true and correct copy. This certification applies to all copies of powers of attorney and related papers,—"

And this is VIII. "No reduction in taxes—"

Mr. Koen: What section? Still on 230?

Mr. Maguire: Yes. I don't think our numbering—the title of this section is "Evidence required to substantiate facts alleged in conferences".

> "VIII. No reduction in taxes proposed nor increases in allowance of claims shall be made unless the evidence upon which such action is taken is [443] submitted in writing and in verified form. All evidence except that of a supplementary or incidental character shall be submitted over the sworn signature of the taxpayer."

And finally, if your Honor please, for emphasis I would like to reread V, section C "Extent of authority delegated." This is talking about powers of attorney.

> "The authority delegated to an attorney or agent in a power of attorney enumerating certain specific acts which may be done will be considered limited to those acts."

In other words, the power is as big or little as the power sets forth.

The Court: The trouble is I don't have any power of attorney before me so I don't know the substance of it. Apparently Mr. Koen isn't able to give it because it has been lost and he is unable to produce anyone who can

say what it was so I have to judge not by the power of attorney itself but by other circumstances.

Mr. Koen: I would like to read, if I may, the paragraph which immediately follows, as I did when I read it, the paragraph that immediately follows the paragraph that Mr. Maguire just read and I will read both of them together, sir.

> "The authority delegated to an attorney or agent in a power of attorney enumerating certain specific acts [444] which may be done will be considered limited to those acts. *A. Express authority required for certain acts.* Express authority to do the following acts must be granted and shown in the power of attorney or such acts will be considered beyond the scope of the agent's authority:
>
> 1. To receive but not to indorse and collect checks in settlement of any refund. (See section 3477 of the Revised Statutes, which prohibits assignments of claims or portions thereof, and title 'checks in payment of refunds'
>
> 2. To delegate authority or to substitute another agent or attorney
>
> 3. To execute consents agreeing to a later determination and assessment of taxes than is provided by statute of limitations
>
> 4. To execute closing agreements relative to the tax liability."

I think those two sections must of necessity be read in conjunction, one with the other.

The Court: There is one thing I would like to call to your attention. I don't know whether you exchanged briefs or not.

Mr. Maguire: We did, your Honor.

The Court: I want to call attention to page 6 of your [445] brief. Humble Oil and Refining Company v. Sun Oil

Company, 191 Fed. 2d 705, which had previously been studied by my law secretary. I want to correct a quotation. It is not "no statement." It says

> "Not every statement made by counsel casually, or in the heat of argument or colloquy with his adversaries, is binding upon the client."

Mr. Maguire: Your Honor, I apologize for that misstatement. It certainly was inadvertence.

The Court: Mr. Koen, you may go ahead.

HAROLD HURST, Sworn

The Court: May it appear on the record also this is a hearing in voir dire examination made under circumstances where all counsel agree that it is the proper procedure and made only in the presence of the defendant himself, whatever the statements are, Mr. Walsh, the Clerk of the Court, the Deputy Marshal, Mr. Reavey, Attorney Walter Hurley, my law secretary, Mr. Maguire, Mr. Garrity, Mr. Di Mento and Mr. Koen and the witness, Mr. Hurst, who is here with no objection on the part of any of those present. I want that to appear on the record. All right.

[Discussion off the record.]

The Court: They are held with the express consent of the defendant, who expressed that affirmation.

Mr. Maguire: That is correct.

[446] The Court: Mr. Maguire agrees.

Direct Examination by Mr. Koen

Q. What is your name, sir? A. Harold Hurst.

Q. Where do you live? A. 15 Hay Road, Newton, Massachusetts.

Q. What, sir, is your profession? A. Certified public accountant and attorney.

Q. In November of 1951 were you employed by the Treasury Department? A. I was.

Q. In what capacity? A. As a special agent.

Q. Directing your attention to November 7, 1951, sir, did you, in your official capacity, receive income tax returns of the defendant William Massei? A. Yes, I did.

Q. What calendar years did they cover, sir? A. From 1945 through 1950.

Q. And following the receipt of those returns, sir, did you cause a letter to be sent to the taxpayer? A. I did.

Q. Can you describe the style of the letter; that is, what kind of postage it carried or what—. A. I sent it registered mail.

[447] Q. Do you have a copy of that letter? A. I do.

Q. All right, sir. You sent it registered mail. Was a return receipt requested? A. Yes, there was.

Q. Did you, in the normal course of your business, receive a return receipt? A. Yes.

Q. May I see the copy of the letter and may I see the receipt, sir? A. [Handing.]

[Mr. Koen hands the papers to Mr. Maguire.]

Mr. Maguire: No objection.

[Copy of letter from Agent Hurst to Defendant Massei, with return receipt marked Government's Exhibit No. 38.]

Mr. Koen: Would your Honor care to examine the contents of the letter that has just been introduced into evidence?

The Court: Yes, I would like to see it. [Examining.] Yes, I have. You have read this, Mr. Maguire, and it is agreed this is a copy of a letter that was addressed to your client, Mr. William V. Massei, under date of November 7, 1951, addressed to 29 Chrome Street, Worcester, and with the heading "In re William V. and Isabel C. Massei." In which the client was notified that an investi-

gation had been initiated into the income tax liabilities of himself and his wife for the years [448] 1945 through 1950 inclusive, the original tax returns for these years being in the possession of the Internal Revenue Office.

Mr. Koen: Of this witness.

The Court: Of this witness. It says "of this office" and I suppose you had charge of them.

The Witness: Yes.

The Court: And with a further statement in the event you wish to—your client wishes to discuss the matter, that Mr. Hurst, who wrote the letter, special agent, would be happy to arrange an interview with him or a duly appointed representative, at his convenience, with the telephone number of the office given, Lafayette 2-4250. And further than that, there was a receipt card signed by William V. Massei, and you agree, Mr. Maguire, that that is his card?

Mr. Maguire: I do.

The Court: And the receipt of that is under date of the 8th of November, 1951. All right.

Mr. Koen: By "date of receipt" you mean date of delivery to the taxpayer?

The Court: Yes.

Q. Now, sir, following that did there come a time when you had some conversation with others in the office of the Bureau of Internal Revenue? Yes or No. A. Will you repeat that question?

Q. I will strike it out. Directing your attention to the 13th [449] day of November, 1951, did you have some discussion with others in your office about this matter? A. Yes, I did.

Q. And either during or following the course of the discussion, sir, did you make some observations with reference to some documents, or a document? A. Yes, I did.

Q. Tell us what you observed in connection with this case.

Mr. Maguire: Objection.

The Court: I am going to receive it. I am trying to weigh the admissibility of this. Go ahead.

A. I made an observation in my diary that Mr. Garrity left powers of attorney.

Q. What is the procedure, sir, when powers of attorney, or what was the procedure at that time, when powers of attorney were filed by one representing a taxpayer? A. The procedures were that the powers of attorney were turned in by the taxpayer's representative, in to the special agent and the special agent then would look over the powers of attorney and, in turn, turn them over to the revenue agent.

Q. Will you follow the course within the department? Where would the power of attorney eventually be located? Who would have custody of it in the normal course? A. My understanding is that it went into the audit section.

Q. Did you observe this power of attorney about which you have [450] made the note in your diary, sir? A. I have no recollection of the contents of the power of attorney.

Q. What would you normally, and what did you observe normally, with reference to powers of attorney that were filed?

Mr. Maguire: If your Honor please, we are only interested in this particular power of attorney.

Mr. Koen: I will come to that next, if I may have this question.

The Court: I will permit it. I am trying to find out what the story is. Your objection will be saved at the proper time.

The Witness: Repeat the question.

[The question is read.]

A. I would observe that they were filed by the taxpayer, that they designated a named representative and that they appointed this representative to represent the taxpayer before the Treasury Department.

The Court: You mean that was the custom and practice?

The Witness: Yes.

The Court: If that wasn't done, would you talk to an attorney for the taxpayer?

The Witness: It was my invariable practice to request a power of attorney, your Honor, in every case.

The Court: Have you got your diary here?

The Witness: Yes, I have.

The Court: That's all right.

[451] Q. Have you any memory, sir, as to whether or not you made an observation on the power of attorney described in your diary as of the 13th of November, 1951? Have you any memory as to whether or not that was signed by the taxpayer, Mr. Massei? A. No direct memory.

Q. No direct memory.

The Court: Would you have made a memorandum note in your diary unless it was executed and signed by him?

The Witness: If it was not a proper power of attorney, your Honor, I would have given it back. But may I say—

The Court: No, let me ask you this.

The Witness: Yes.

The Court: Using that note, either for the purpose of refreshing your recollection or defining your custom or practice, would you have made that diary entry if it was not properly executed?

The Witness: I would not, your Honor.

Q. Were you aware, sir, of the regulations covering your activities with representatives of taxpayers and the requirements which must precede the interviews with any representatives of taxpayers? A. Generally, yes.

Q. Having in mind the requirements that a power of attorney be filed and a card of enrollment be presented to you, kindly tell the Court whether or not you would talk to Mr. Garrity on the Massei case unless a power of attorney had been filed? [452] A. Not the way I did talk to him.

Q. All right, sir. Now, when in connection with the Massei case did you meet Mr. Garrity next following the 13th of November? A. The next time I met Mr. Garrity was November 16th. Actually I never met Mr. Garrity on November 13th, Mr. Koen.

Q. I understand that. A. The first time I met Mr. Garrity in connection with this case was on November 16, 1951.

Q. Tell us what happened on that occasion, sir? A. I asked Mr. Garrity if he would bring Mr. Massei in for a sworn statement. We also discussed the making of an appointment for visiting a safe deposit box in Worcester which belonged to Mr. Massei, and I asked for a number of different items in the way of information with respect to Mr. Massei's net worth.

Q. What did Mr. Garrity say on that occasion, sir, anything? A. He said he would make an appointment for me to visit this safe deposit box in Worcester probably on the following Tuesday. He was also going to go to Mr. Massei's house on Sunday and start compiling all the information that I had asked for, and he said that he wanted to disclose everything to us.

Q. Is that all he said, sir? A. That is my best recollection.

Q. What did he say with reference to your question designed to bring Mr. Massei in for a sworn statement? A. He agreed to bring him in for a sworn statement at that time.

Q. All right. [453] A. But no definite date was set.

Q. All right. Now when next in connection with the Massei case did you see Mr. Garrity? A. On November 19th, Mr. Garrity came up with some information on this case. He came up to my office.

Q. At the Bureau of Internal Revenue? A. Yes.

Q. All right, sir. And following that occasion, when did you see Mr. Garrity in connection with this case? A. I saw Mr. Garrity on November 20, 1951.

Q. Go ahead. Where did you see him, and who was with you, and what was done? A. I saw him at the Worcester County Trust Company in their safe deposit box vault.

He was with Mrs. Massei, and I was with a revenue agent by the name of William O'Brien.

Q. What was done at that time with reference to the safe deposit box? Was it opened? A. Yes, it was opened.

Q. And what was done with reference to its contents? A. Mr. Garrity and Mr. Massei allowed us to examine the contents of the box, and we intentoried those contents.

Q. Now when next following that date did you see Mr. Garrity on this case? A. I saw Mr. Garrity on November 23.

Q. Tell us what happened on that occasion? First of all, [454] what time of day did you see him, if you know? A. Around 3:30 p.m.

Q. Will you tell us the conversation, if any, and tell us what happened in general? A. Mr. Garrity brought in a memorandum showing the breakdown of dividends and interest reported by Mr. Massei. He also brought in some Worcester County Trust Company bank statements and cancelled checks. And we made an appointment for going to Westerly, Rhode Island, on the next Tuesday, to inventory a safe deposit box down there.

Q. Were the Worcester County Trust Company bank statements and cancelled checks left with you on that occasion, sir? A. No, they were not.

Q. Tell us what happened and what was said in reference to them? A. Mr. Garrity brought them up but he said he had not had an opportunity to look them over and he would appreciate it if we would let him have them back to look over, and then he would bring them back to us.

Q. The bank statements, sir, if you remember, were they the originals? A. Yes. That is my best recollection.

Q. When next following November 23 did you see Mr. Garrity in connection with this tax matter involving Mr. Massei? A. He came up again to my office at 4 o'clock on November 26th.

[455] Q. What happened then, sir? A. I believe he gave me some savings bank books at that time for my examination. And we also made definite arrangements to go down to Westerly the next day.

Q. Did you go to Westerly the next day? A. Yes, I did.

Q. And how did you go to Westerly on that occasion? A. I believe Revenue Agent Louis Calatrello, Mr. Garrity, and I, went in my car, leaving Boston around 8:30.

Q. When you arrived at Westerly, whom did you observe there? A. Well, we met Mr. Massei at the Washington Trust in Westerly, and we went into the safe deposit vault of the Washington Trust Company.

Q. Had you ever met Mr. Massei before, sir? A. I had never seen Mr. Massei before.

Q. Had you ever in any form communicated with him, sir, that you were to meet him at Westerly, Rhode Island, for the purpose of examining the contents of his safe deposit box? A. I did not.

Q. Did you enter the safe deposit vaults? A. Yes, I did.

Q. Who entered there? A. Mr. Calatrello, Mr. Garrity, Mr. Massei, and myself.

Q. Was the box in the vault opened? A. Yes. I don't —I don't have a recollection of entering the [456] vault,

but the box was brought out and we entered a conference room.

Q. I see. Were the contents of that deposit box inventoried, sir? A. Yes, we listed those and examined them.

Q. Now while you were in that conference room, or at some time while the contents of that safe-deposit box were being inventoried, did you have some conversation with Mr. Massei? A. My recollection is I had a very short conversation with Mr. Massei.

Q. Tell us what you said to him, sir, and what, if anything, he said in reply? A. I believe I asked him, in substance, where all the money came from with reference to his net worth, and he answered from a number of different people at different times, and Mr. Garrity cut in and that was the end of that.

Q. What did Mr. Garrity say? You say he cut in. What did he say? A. I believe Mr. Garrity reiterated that he had received gifts for allowing liquor trucks to roll through Worcester many years ago.

Q. Was the period— Is that all you remember of that? A. Yes.

The Court: Was that in the presence of the defendant?

The Witness: Yes, it was.

[457] Q. Was the period during which these trucks were rolling described more particularly at that time, sir? A. I don't have any recollection except he had reference to many years ago.

The Court: Now is this a good time to stop?

Mr. Koen: I think so.

The Court: We'll go along and hear it this afternoon, and if we finish, we'll go along as far as we can with the jury. Tell the jury to stay upstairs and come back at quarter past two.

[Recess from 1:05 p.m. to 2:15 p.m.]

Q. [By Mr. Koen.] Mr. Hurst, I think before we recessed for lunch you were talking about a conference that was held at the bank in Rhode Island, is that right? A. Yes, I was.

Q. And you have given us the conversation, so far as it relates to what Mr. Massei said to you in response to a question as to the funds, and Mr. Garrity's statement in reply, is that correct? A. The substance, yes.

Q. Was there other conversation there that day? A. My recollection is that—of course, there was other conversation that day. There was a conversation with respect to jewelry.

Q. Well, no— A. [Continuing.] Owned by Mr. Massei.

Mr. Koen: I don't believe, for the limited purpose of this hearing, the Court is interested in that matter.

The Court: I didn't hear. What was that?

Mr. Koen: I have asked the witness if he has given us all the conversation. He said there was other conversation with reference to jewelry. I suppose for the limited purpose of this hearing you don't want to hear about that?

The Court: No.

Mr. Koen: All right, sir.

The Court: Except, when he had that conversation Mr. Garrity was with him, wasn't he?

[459] The Witness: Yes. Mr. Garrity, Mr. Massei, Mr. Calatrello, and myself, were all there.

Q. Did there come a time when you left the bank premises? A. Yes, there came a time when we left the bank premises.

Q. And the party split up. And how did you people leave there? A. Well, we went outside, all four of us, and Mrs. Massei was sitting in a car outside the bank, I believe across the street, at the time, and I had asked

Mr. Garrity the origin of deposits in the Washington Trust. I believe he went over to ask her that question, and returned to tell me that those deposits she thought were dividend checks, and then I believe Mr. Garrity went back to Worcester with Mr. and Mrs. Massei, and I went to Worcester in my own car with Mr. Calatrello.

Q. You left the vicinity of the bank with the Masseis? Is that what you mean? A. Yes, I believe so.

Q. Now did you meet Mr. Garrity later on in the day? A. Yes.

Q. Where did you meet Mr. Garrity later on in the day? A. I don't remember exactly where, except it was some place in Worcester.

Q. And did you return to Boston that afternoon, and was Mr. Garrity with you when you returned to Boston? A. Yes.

Q. Did you have an appointment with Mr. Garrity on the 30th of [460] November, 1951? A. Yes.

Q. What happened on that date? A. Well, he didn't come in at 1:30, when I made the appointment, but he came in about 3 o'clock.

Q. All right. Did you have some talk with Mr. Garrity at that time? A. Yes, we did. Mr. Calatrello was present then, too.

Q. What was said at that time by Mr. Garrity, sir? A. Well, Mr. Garrity continued to advance his argument that Mr. Massei had the $85,000, meaning the $85,000 which had been redeemed on these annuity policies as of December 31, 1945. He also, I believe, at that time—

The Court: Well, I think what you ought to do is leave out the words "I believe" and state what he said.

A. [Continuing] He said that Mr. Massei had the $85,000, referring to the proceeds from the annuity policies or the cash represented by the annuity policies as of December 31, 1945.

Q. What else was said on that occasion, or what did you say to him and what did he say to you? A. Well, there were two statements missing from the Worcester County Trust checking account, and I asked Mr. Garrity if he wouldn't please get me those statements. I also asked Mr. Garrity to bring Mr. Massei in, repeating an earlier request, for an oral or sworn statement, and I asked him to get me some [461] data on any vacations Mr. and Mrs. Massei had taken, and if there had been any gifts to relatives.

Q. Did you ask Mr. Garrity for anything else on that occasion? A. I have no recollection of asking for anything else.

Q. Was there some discussion about his official police record on that occasion? A. Yes, yes.

[462] Q. Now, what did Mr. Garrity say, if he said anything, in response to that list of material? A. He said he would get me everything I had asked for.

The Court: And did he?

The Witness: Substantially everything, yes, sir. He was very cooperative.

Q. Directing your attention to December 6, 1951, sir, did you have any conversation with Mr. Garrity? A. I believe I had a telephone conversation at that time.

Q. Tell us on that occasion what Mr. Garrity said? A. Mr. Garrity said he had compiled a good deal of the information that I had requested and I also asked him to find out if an inventory had been filed by the executor in the Pilade Massei estate.

Q. Directing your attention to December 7, 1951, were you in communication with Mr. Garrity? A. No, I wasn't. I went up to his office.

Q. What did you do at his office, sir? A. I believe I picked up a letter at his office directed to me.

Q. Directing your attention to December 26, 1951— A. Yes, sir.

Q. —did you communicate with Mr. Garrity's office? A. Well, I communicated, I believe, with his Worcester office.

Q. I see. Did you leave a message there? A. I believe so. [463] Q. All right, sir. Directing your attention to the 2nd of January, 1952, did you have some talk with Mr. Garrity on that occasion? A. What was that date again?

Q. January 2, 1952, sir. A. Yes, I did. I had a conversation with Mr. Garrity.

Q. Where was this conversation held? A. I believe in my office.

Q. What did Mr. Garrity say on that occasion? A. He said he would not allow his client, Mr. Massei, to come in under any circumstances with reference to giving us any testimony or making any statements.

Q. Did he say anything else? A. Well, yes. He now said that Mr. Massei had a beginning net worth prior to 1945 of somewhere between $100,000 and $110,000.

Q. Directing your attention to January 3, 1952, did you have some conversation with Mr. Garrity?

Mr. Maguire: What is the date?

Mr. Koen: January 3, 1952.

A. On the telephone, yes.

Q. Tell us what the conversation was. A. Mr. Garrity agreed to work up a net worth statement on Massei and have it to me by Monday and he also agreed to allow me to talk to Edward Massei.

The Court: Who is Edward Massei?

[464] The Witness: Edward Massei, sir, is William V. Massei's brother. He testified here.

Q. Is that the man who testified here in this trial? A. Yes.

Q. Directing your attention to January 18, 1952, did

you have a conversation with Mr. Garrity? A. I had a telephone conversation.

Q. Tell us what was said, sir. A. I told Mr. Garrity that he could come up and take back Mr. and Mrs. Massei's bankbooks.

Q. From whom had you obtained those bankbooks, sir? A. From Mr. Garrity.

Q. Did you have some other conversation with him on that occasion? A. I asked Mr. Garrity if Mr. Massei was going South and he said that he didn't know anything about that.

Q. Did Mr. Garrity come to your office to pick up the bankbooks, sir? A. Yes.

Q. I direct your attention to January 24. A. Yes. Some bank records.

Q. Was that the date, sir? A. Yes. January 24.

Q. Did you have some conversation with Mr. Garrity at that time? A. Yes, I did.

[465] Q. Tell us what was said on that occasion by you to Mr. Garrity and Mr. Garrity to you. A. Well, I had—I told him I wanted an affidavit from Edward Massei which had not yet been forthcoming, although I had requested it before, and I told him that if he couldn't get it for me voluntarily I would have to get a sworn statement from Edward Massei. I also told him that I thought I would recommend criminal prosecution on this case and I believe that Mr. Garrity again advanced the argument that all the money that showed up on the net worth statement had been received by Mr. Massei prior to December 31, 1945; that Mr. Massei, from 1923 to 1931, had been on duty on Shrewsbury Street, where he received gifts from liquor trucks passing through Worcester during that period and that from 1933 to 1943, Mr. Massei had been on the vice squad and also received gifts during that period while he was on the vice squad, and that none of

the monies on the net worth statement were received subsequent to 1945 because Mr. Massei was not in a position to get any of those monies.

The Court: I would like to have you use the words, what he said. Don't characterize it by argument. Just what he said, will you, please?

The Witness: Yes, your Honor.

The Court: What you said and what he said.

Q. Directing your attention—are you through, sir?

The Court: Yes.

[466] Q. [Continued] Directing your attention to February 14, 1952, did you see Mr. Garrity on that day? A. Yes, I did.

Q. Tell us what happened. A. Mr. Garrity simply brought up the affidavit of Edward Massei which I had requested. I don't have any recollection—

The Court: You agree that wouldn't be admissible in this trial, anyway, the affidavit of Massei?

Mr. Koen: Not the contents of the affidavit. The fact that it was procured, however.

The Court: Only bearing on the question of the fact that he was acting for his client.

Mr. Koen: I thought that was the limited purpose of this hearing.

The Court: That's right.

Q. Now, directing your attention to February 13, 1952—

Mr. Koen: I think, may I say this, the fact that he brought in the affidavit is admissible. I don't believe the contents of an affidavit would be admissible. The man has already testified, anyway, may it please the Court.

Q. Directing your attention to February 13, 1952, did you see Mr. Garrity on that day? A. Yes, I did.

Q. Where? A. In my office.

Q. What happened on that occasion? [467] A. Mr. Gar-

rity brought up consent waivers that he had Mr. Massei sign, for Mr. Calatrello.

Q. Who is Mr. Calatrello? A. Mr. Calatrello was the Revenue Agent on the case.

Mr. Koen: I suppose your Honor doesn't want to go into what consent waivers are?

The Court: I don't know what they are.

Q. Tell the Court what consent waivers are, Mr. Hurst. A. Consent waivers, Forms 872, which extend the statute of limitations for which the Revenue Agent can make adjustments and during which the taxpayer can claim a refund.

The Court: Was there a waiver—.

The Witness: There was a civil waiver of the statute running on certain returns. In other words the 1948, the statute would ordinarily run March 15, 1952, so the Revenue Agents ordinarily get consents to extend that statute on cases where they have not yet been able to determine the deficiency. Get the consent of the taxpayer to waive the statute of limitations.

The Court: That is on the civil side.

The Witness: Yes.

The Court: I am not interested in the civil side, am I, Mr. Koen?

Mr. Koen: No, I am not, sir, but I do think that the obtaining of these waivers and the signing of them and the [468] presentation by Mr. Garrity is indicative of his right to represent this defendant, and his representation of them.

Mr. Maguire: They were signed by the defendant, I understand.

Mr. Koen: Oh, yes, waivers are always signed by the defendant.

The Court: That is the usual course of procedure fol-

lowed in all these cases, isn't it, by lawyers? They get whatever you want them to get?

The Witness: Yes. They have a complete option as to whether they want to get them or not. We don't compel them, generally, to get them.

The Court: What do you expect lawyers to do, in case this evidence is admissible, in the future in connection with the investigations you are going to make of tax cases?

The Witness: Your Honor, I won't be making any more investigations—

The Court: What do you think they will do, in the light of your experience and training? They won't let themselves, will they?

The Witness: Yes, they will, your Honor, because much of this information the Agent can get for himself without the cooperation of the taxpayer so that—

The Court: How can he compel a taxpayer to talk if he doesn't operate a corporate business? Under the provisions of [469] the Constitution you have no right to compel them to talk.

The Witness: That's true, your Honor.

The Court: Certainly.

Q. On February 13 did anything else happen, sir, besides delivery of the waivers by Mr. Garrity? A. I gave Mr. Garrity back some checks on the Worcester County Trust Company checking account and he signed a receipt for those checks.

[470] Q. Did you have a talk with Mr. Garrity on that day? A. What is the date again, please?

Q. April 11, 1952, sir. A. Yes, I had a telephone conversation with him.

Q. I beg your pardon, sir. Directing your attention to April 9, 1952, if I may go back there, did you have some—did you see Mr. Garrity on that day? A. Yes, I did.

Q. Where did you see him, sir? A. At my office.

Q. Did you have some talk with him? A. Yes, I did.

Q. Tell us what you said to him and what he said to you? A. I told Mr. Garrity that I had found that Mr. Massei had purchased some land in West Harwich on the Cape, information which Mr. Garrity knew nothing about, which he had not given me before.

Q. Now on the 11th, I think I interrupted you, when you said you called Mr. Garrity on that day. Is that correct? A. Yes.

Q. Did you have some talk with him? A. Yes. I asked him to come up and get certain original invoices pertaining to automobiles that Mr. Massei—that I had received from Mr. Garrity, and I asked him to come up and take them back.

[471] Q. On the 29th of April, 1952, sir, did you have some business with Mr. Garrity in connection with this case? A. Well, I returned certain invoices to Mr. Garrity's office and received a receipt.

Q. From whom had you originally received those invoices? A. Mr. Garrity.

Q. Directing your attention to the 16th of May, 1952, did you see Mr. Garrity at that time some place? A. I saw him in the Federal Building here.

Q. Did you have some talk with him? A. Mr. Garrity told me that he had an appointment with Mr. Altkrug on the following Tuesday.

Q. Whom, sir, was Mr. Altkrug? A. Mr. Altkrug was in the Regional Counsel's Office of the Bureau at that time.

Q. Now, sir, during the period that I have just covered in my examination, did you receive letters from Mr. Garrity in response to your inquiries concerning certain matters of Mr. Massei? A. Yes, I did.

Q. May I see them, please? A. Yes. [Handing papers to Mr. Koen.]

Mr. Koen: I offer these letters.

The Clerk: Government's Exhibit 39.

[Four letters from W. Arthur Garrity, Jr. to [472] Special Agent Hurst marked Government's Exhibit No. 39.]

Q. Now, sir, in addition to the letters which you have, that I have just offered in evidence, were there receipts? A. Yes.

The Court: Do these bear on the question of the authority of Mr. Garrity speaking for his client?

Mr. Koen: I believe so, sir.

I offer this receipt.

The Clerk: Government's Exhibit 40.

[Receipt signed by W. Arthur Garrity, Jr., marked Government's Exhibit No. 40.]

Mr. Koen: I offer this.

The Clerk: Government's Exhibit 41.

[Receipt signed by Miss M. L. Dubois, Secretary, on the letterhead of Maguire, Roche and Garrity, dated April 29, 1952, marked Government's Exhibit No. 41.]

Mr. Koen: I offer this receipt, too, if it please the Court.

The Clerk: Government's Exhibit 42.

[Receipt signed by W. Arthur Garrity, Jr., dated February 13, 1952, marked Government's Exhibit No. 42.]

[Clerk hands documents to the Court.]

The Court: All right, Mr. Koen. These letters are offered only for the purpose of the narrow issue before me, is that right?

Mr. Koen: At this time, yes, sir. May I further identify them for the record?

[473] First is a letter dated November 15, 1951, on the letterhead of Maguire, Roche and Garrity, a three-page document signed by W. Arthur Garrity, Jr., addressed to the Intelligence Unit, Treasury Department, 40 Central Street, Boston, Mass., Attention: Special Agent Hurst,

re: William V. and Isabel C. Massei, 29 Chrome Street, Worcester. This is Government's Exhibit 39. The second letter calendar-wise is a letter dated November 19, 1951, on the letterhead of Maguire, Roche and Garrity, also a three-page letter signed by W. Arthur Garrity, Jr., and addressed to the Intelligence Unit, Treasury Department, 40 Central Street, Boston, Mass., Attention: Special Agent Hurst, re: William V. and Isabel C. Massei, 29 Chrome Street, Worcester. The third one is a letter dated November 28, 1951, on the letterhead of Maguire, Roche and Garrity, a two-page letter, signed by W. Arthur Garrity, Jr., addressed to the Intelligence Unit, Treasury Department, 40 Central Street, Boston, Mass., to the attention of Special Agent Hurst, re: William V. and Isabel Massei. The fourth letter in Government's Exhibit 39 is a letter dated December 6, 1951, on the letterhead of Maguire, Roche and Garrity, a two-page letter signed by W. Arthur Garrity, Jr., addressed to the Intelligence Unit, Treasury Department, 40 Central Street, Boston, Mass., Attention: Special Agent Hurst, Re: William V. and Isabel Massei, and the fifth letter is a letter dated—this is still Government's Exhibit 39—a [474] letter dated December 11, 1951, on the letterhead of Maguire, Roche and Garrity, a single page letter, signed by W. Arthur Garrity, Jr., addressed to the Treasury Department, Intelligence Unit, 40 Central Street, Boston, Mass., Attention: Special Agent Hurst.

Government's Exhibit No. 40, for the record, is a two-page document, signed by W. Arthur Garrity, Jr., which recites a list of records of William V. Massei and Isabel C. Massei, 29 Chrome Street, Worcester, Mass., being returned to W. Arthur Garrity, Jr., Attorney for Mr. and Mrs. Massei, and a detailed listing of the records covered by the receipt.

Exhibit No. 41 is a receipt of April 29, 1952 on the letter-

head of Maguire, Roche and Garrity, signed by Miss M. L. Dubois, Secretary, which reads as follows: "Received this day invoices from Mr. Hurst re case of William V. Massei."

And Government's Exhibit 42 is a document dated February 15, 1952, signed by W. Arthur Garrity, Jr., and is a list of checks of Isabel C. Massei drawn on the Worcester County Trust Company, Worcester, Mass., which were returned as the document says "herewith".

[475] Q. Now, if I may, while this is a hearing for a limited purpose, I think we scanned over quickly the conference that you had on January 24, 1952, with Mr. Garrity, and in the course of your testimony you told us the conversation you had with Mr. Garrity; is that correct? A. Yes.

Q. And I think in the course of your testimony you were dealing with the matter of trucks? A. Yes.

Q. Mr. Garrity mentioned trucks. Now, in addition, you have given us all the conversation as you remember it on that day? A. No, I haven't.

Q. Please, will you tell us what the conversation was and what words Mr. Garrity used? A. He said that he would probably be willing to pay the deficiencies found by the Revenue Agent.

Q. Thank you, but that isn't what I had in mind. If I may go back to that portion of the conversation that you gave to us before, there was testimony with reference to trucks; is that right? A. Yes.

Q. Now will you go back, please, and tell us the entire conversation and words which were used by Mr. Garrity at that point? A. I can only tell you the substance, Mr. Koen.

[476] Q. Then give us the substance, if you please. A. The substance was that from 1923 to 1931 Mr. Massei was on the police force, assigned to a district which took in Shrewsbury Street in Worcester, and that during that

time and on that assignment he received gifts for allowing trucks carrying liquor that ran through Worcester on this Shrewsbury Street. That was the substance of what Mr. Garrity told me.

Q. In addition, were there any other words used, sir? A. I don't know whether they were used at that particular conference with Mr. Garrity but he did use at other times, or at times, other words in connection with the gifts.

Q. What other words? A. He used the word "graft" or "gifts."

Mr. Koen: I have no further questions of Mr. Hurst.

The Court: Now, Mr. Maguire, I don't intend to have a long cross examination because I am not going to pass upon the weight. The question before me is whether or not the circumstances in this case show that the defendant either actually or, we'll use the word, impliedly, authorized the attorney to make disclosures to a third person—the attorney being Mr. Garrity. Now that is the narrow question I have to rule on, and I am not going to settle it as a mixed question of fact and law, I am going to settle it as a question of law; and, obviously, if I settle it as a question of law it becomes a fact, if I settle it against you, for the jury to accept it or reject it as they [477] see fit, because, after all, regardless of my own particular feelings with reference to this type of testimony, I'm here to administer the law, not to pass upon the propriety of using testimony. I am here to rule whether or not the evidence is admissible. I am frank to confess that while I may have my personal feelings with reference at times to the admissibility of evidence, on the other hand I have to forego any feelings I have in connection with its applicability or admissibility or non-admissibility. That is what I have to do. It isn't an easy task. It certainly isn't an easy one here for me. But I have to pass on it and pass on it as I think I should in connection with what I consider

to be legally proper. So that I do not want to go into too much of it on cross examination. Now, if I admit this, I am going to permit you a long cross examination, a full cross examination. I am going to give you wide cross examination. I am not going to limit you too much. That is the only question before me.

Mr. Maguire: Well, if your Honor please, I think we will not go beyond the bounds of what you have laid out.

The Court: All right. What I want to do is get on with this case if I can.

Mr. Maguire: Well, if I may, please, your Honor.

Cross Examination by Mr. Maguire

X-Q. Mr. Hurst, you testified as to this power of attorney which Mr. Garrity filed that you know nothing of the contents, no [478] memory, no recollection of the contents? A. Correct; yes.

X-Q. So that you are unable to state to this Court just what the scope of that authority is, acting under that power of attorney? A. That is correct.

X-Q. Thank you. Now, after Mr. Garrity appeared before you as the Treasury Agent representing the taxpayer, he then, as you put it, cooperated with you very well? A. He really did, yes.

X-Q. And you also stated at that same time that, in effect, it saved you a lot of digging, most of these things would be readily available to you? A. Yes.

X-Q. And I refer to such things that he turned over to you, such as bank books, stock records, cancelled checks, automobile invoices, and things such as that? A. Yes.

X-Q. Now, in addition to that, Mr. Hurst, you apparently asked him to furnish you with certain additional information, if I might describe it, as non-documentary in nature; you put certain questions to him for him, in effect, to get the information for you from the taxpayer? A. If you could be more explicit, I could answer.

X-Q. Well, on non-documentary—I think that a bank book is documentary evidence. [479] A. Yes.

X-Q. A cancelled check is documentary evidence. A. Yes.

X-Q. But what I'm getting at is, there was certain other information which you wanted and you asked him to get the entries for you? A. Certain other information, yes.

X-Q. Right. And that information, after you asked him to get it, he sent that back to you in the form of letters which have been introduced in evidence? A. Some by way of letters and some by way of a schedule.

X-Q. Well, again, in writing? A. Yes. Some, yes.

X-Q. Yes, that is correct, Mr. Hurst. A. He sent me letters with information in it that I had requested—yes.

X-Q. And it was over his signature? A. Yes.

X-Q. And presumably when you first asked him the question he didn't have the information? A. Yes.

X-Q. And he presumably went to the taxpayers and got it and then sent you the information over his signature? A. Yes.

X-Q. And that's what has been introduced in evidence as Government's [480] Exhibit 39? A. Yes.

X-Q. Now, coming to the conference on January 24, 1952, when you took the stand this afternoon, Mr. Hurst— You have notes in front of you, I see. A. Yes.

X-Q. Are you using those to refresh your recollection? A. To refresh my recollection, that is correct.

X-Q. But you are testifying from present memory? A. From present memory.

X-Q. May I see your notes, please, as relative to January 24th? A. Yes [handing].

Mr. Maguire: Your Honor please, may I have a minute?

The Court: Oh, certainly.

[A pause.]

[481] X-Q. Now, Mr. Hurst, these are notes from which —you have testified you used them to refresh your recol-

lection prior to testifying today. When were these notes made up? A. They were made up about a week ago from my diaries.

X-Q. So that your diaries are the previous entries? A. Yes.

X-Q. Now may I look at your diary entry for January 24, 1952? A. [Handing.]

X-Q. [Examining] Will you be good enough to read into the record everything that appears in your diary entry on January 24, 1952 that pertains to Arthur Garrity or the Massei case? A. Yes I will. Arthur Garrity came up in p.m. Gave him back Massei bank records etc. with exception of a few checks I wanted photostats of. With Revenue Agent Calatrello present I told Garrity I thought I would recommend prosecution in the Massei case. Appears he would not now hedge on the amount of taxes to pay. Would probably be willing to pay deficiencies found by Revenue Agent. I also said I wanted affidavit from Edward Massei still. If he won't give it voluntarily I will go after him for sworn statement. Pastore came in at the tail end of the conference.

X-Q. Fine. Now, this note which appears in the typewritten— A. Yes.

X-Q. —is identical with what you have just read from your original entry? [482] A. Yes.

X-Q. And there is no mention whatsoever there, in either the diary or in this typewritten note, or these liquor trucks rolling through Worcester or about Lieutenant Massei's or Sergeant Massei's vice squad activities from 1932 to 1943? A. That's correct.

The Court: You see what I am getting into now—

Mr. Koen: Wait a minute. May I object to that last question because I don't think there was any testimony covering the period from 1933 on.

Mr. Maguire: The record will speak for itself.

The Court: I am getting into a situation which goes far beyond the scope of what I have had this limited hearing for.

Mr. Maguire: If your Honor please—

The Court: These questions are certainly proper questions for you to ask upon the assumption that I admit this. This witness has testified, as I remember it, if he testifies to it and if it is essentially going to make him a witness, he said that Mr. Garrity met him with his client and in the presence of the client Mr. Garrity made this statement, that he got this money within the X period and Y period, when he was patroling Shrewsbury Street, from liquor trucks that went through Worcester. Now when the witness testified that Mr. Garrity made that statement, he said that the defendant, Mr. Massei, was with him and there is nothing to show that he said anything. The thing [483] I have to pass upon is the weight of it. I don't want to get into a situation where I am going to be having this voir dire examination at a time when this evidence ought to be before a jury. I do this for the limited purpose and I don't want to have extensive cross-examination which goes to the weight of the credibility of this witness's testimony and which would become effective in the trial of the case, in cross-examination. Unless I am careful I am going to build up a record where the transcript taken today and where a witness will be taken tomorrow and the next day, and he will be asked what he said before me, and that is a situation I want to avoid, if possible.

Mr. Maguire: If your Honor please, I will go along with just a few more questions. As I see it, with Mr. Hurst's testimony, there are two distinct problems. First there is the testimony down in Westerly at the safe deposit with Mr. Garrity and the defendant present. That is one category and there is no question but what that evidence is competent, if it is relevant. On the other hand I have

the testimony of Mr. Hurst on this December 24th date—or January 2nd date—where the defendant—January 24, 1952, where the defendant was not present, where the defendant's attorney is alleged to have made certain admissions which the government wants to introduce into evidence and there is the question of the scope.

Mr. Koen: That is not the question which is presently before the Court, however.

[484] The Court: I have, in addition to that, apparently a request for information. I am not passing upon the moral proprieties of this at all. I have already indicated my opinion. I am passing upon the fundamental right of the sovereignty of the United States to avail itself of the rules of evidence in connection with the trial of criminal cases.

I suggest this: Coming within the philosophy behind the Himmelfarb case is another series of incidents—I use that word so there will be no room for dispute over it—incidents which the government says have a direct bearing upon the question of actual authority, special circumstances. That is Mr. Garrity, and I want to say in the presence of his client it is what the ordinary lawyer would do. Mr. Hurst, in the performance of his duty, and I say this with no reflection upon him in the least—carrying out his duties as an agent of the government of the United States, he made certain requests for certain information and Mr. Garrity said, "I will go out and get it for you" and then we have, as a result of that, a series of letters, and I assume that is the reason why you have introduced them?

Mr. Koen: Exactly, sir.

The Court: That's right. I have been watching this very carefully. It seems to me that I have to consider that and I can't consider it except in only one way, as a Judge of this court. You know exactly what I mean. I can't characterize it. The right of the government, in the

exercise of its prosecutive [485] powers, to pursue a trial, and it is the corresponding obligation of a judge to regulate these trials so that they conform, not to a capricious point of view but rather to a point of view that doesn't express its personal feelings but a point of view that expresses just one question, and that is whether or not it is evidence that is properly admissible.

Mr. Maguire: Well, yes, whenever you get to this question of his authority to make these admissions, both to Mr. Hurst and to Mr. Isber—

The Court: I am on it now.

Mr. Koen: That is why I thought we were holding the voir dire.

Mr. Maguire: I have just one or two questions left with Mr. Hurst and then if you are disposed, I would be very pleased to argue the point and call some cases to your attention.

The Court: You mean as expressed in your memorandum?

Mr. Maguire: Largely.

X-Q. Mr. Hurst, directing your attention to November 27, 1951, which is the date when you were down in Westerly, Rhode Island, examining the contents of Mr. Massei's safe deposit box— A. Yes.

X-Q. Will you please read from your diary the memorandum which you made as a result of that visit? A. Left Boston 8:30 a.m. with Revenue Agent Calatrello, Attorney Arthur Garrity, arrived Westerly, Rhode Island 11:10 a.m. Went [486] through William V. Massei's box with Massei present and inventoried contents. Mr. Garrity asked Mrs. Massei, who was waiting in car outside, origin of deposits in Washington Trust Company account. She thought they were dividend checks. Garrity went back to Worcester with Massei. Went to Worcester and gave B. Reed and Company original checks and cards and picked up invoices

on Isabel Massei account. Left Worcester 3:40 p.m. and took Arthur Garrity back to Boston.

X-Q. Fine. Now, Mr. Hurst, can you tell me with relation to the date November 24, when you made the entries in that—November 27, when you made that entry in that diary—

Mr. Koen: I am going to object to this line of questioning, may it please the Court, because I think I know what Mr. Maguire is doing, but what has that to do with the very limited purpose of this voir dire?

Mr. Maguire: If your Honor please—

The Court: I will admit the answer to the question. Go ahead.

The Witness: Probably on November 28.

X-Q. The next day? A. Yes.

X-Q. Did you have any other memoranda of this conference other than in your diary, Mr. Hurst? A. Yes.

X-Q. When did you make that memorandum? [487] A. This memorandum was also made the next day. I believe.

X-Q. And may I ask whose writing this is, please? A. Mr. Calatrello's. May I correct that, your Honor? This memorandum was made the same day. There are other memoranda in here that were made the next day. This memorandum was made on November 27, 1951.

X-Q. This was made by Mr. Calatrello in the safe deposit box down in Westerly—

Mr. Koen: That is not what the witness says. He says some of it was and some of it was made the next day.

X-Q. Could you tell us what portion was made the next day? A. This summary was made the next day.

Mr. Maguire: If your Honor please, I would like to introduce into evidence what purports to be an inventory of the contents of the safe deposit box at the Washington Trust Company in the name of William and Isabel Massei

dated November 27, 1951, with an attached summary sheet.

The Court: Why should I receive it now when this question before me is limited?

Mr. Maguire: Very good. May it be marked for identification?

The Court: Certainly.

Mr. Koen: I will have them available in court any time you want them, Mr. Maguire.

Mr. Maguire: I would like the opportunity of examining [488] it, and this also applies to the notes which Mr. Hurst made, which are copies of his diary entries.

The Court: They may be marked for identification.

Mr. Koen: I object. Let me have a chance to object.

The Court: It is only marked for identification. It isn't offered in evidence.

[Inventory of contents of safe deposit box at Washington Trust Company dated November 27, 1951 with attached summary sheet and copies of diary entries of Witness Hurst marked Defendant's Exhibits E and F for identification.]

X-Q. In relation to the January 24, 1952 conference about which I asked you, do you have any other memorandum relative to that conference with Mr. Garrity? A. I do not.

The Court: Would you be good enough to bring the jury down? I think I will give counsel the opportunity to argue and I think this is an important matter and I don't want to foreclose counsel for the defendant or counsel for the government. Bring them down here so that they will know we have been working on something, and I will send them home. You may open the door, if you want to, and if the press is out there, let them in.

[The jury returned.]

The Court: Now, Mr. Foreman and Ladies and Gentlemen of the Jury, first I want to give you my assurance

that since you have left here, with the exception of the recess period, I [489] have been receiving some testimony and I have been giving consideration to matters under a formula which is a very efficacious one, and under a formula which I know the gentlemen of the press will appreciate is necessary. Obviously if they were in here and if they were listening, and they were here and then they learn a story on it, and if that evidence was excluded by the Court—remember now we are on the government's case—it might well be a basis for a mistrial. I think it is the responsibility of a judge to try to protect the rights of all parties. One of the parties here is the public, speaking through its channels of information that come from the papers.

These are very important questions, and I have explained to you why I was doing it and I felt that it was the advisable way to do it. It is novel, although I have seen it done before, and it has to be done under circumstances where the parties will have their day in court. No witnesses have been in here except whenever there was occasion to call them. The court reporter has been here, the clerk of court has been here and my law secretary has been here and the United States Marshal and his associate, Mr. Ross, and the defendant.

There is certainly a right to be at a hearing like this, and everyone has felt that he should be here, the government and the defendant, and I feel the same way.

It is apparent we are not going to finish. I could keep you up stairs and probably bring you down at five minutes to four [490] and we would hardly get started.

So, out of deference to your time on this beautiful spring day and with the realization that I would be imposing upon you if I kept you, I decided myself that I would send you along home and I am going to ask you to be back at 10 o'clock tomorrow morning.

I am going to ask you to refrain from forming any conclusion except one, because there is a lesson that flows from it, a wonderful lesson; it is a lesson which vindicates our system of jurisprudence and it is a fine milestone along which the rights of parties travel, the rights of the sovereignty of the United States and the rights of this defendant, safeguarded so that when we reach the question as to what constitutes admissible evidence, let me repeat what I said to you this morning. The fact that the Court admits a piece of evidence has no, of itself, no force and effect except that which the law intended it should have, namely as a factual disclosure and as a part of the picture upon which a jury of 12 fine citizens pass, in a criminal case, upon the guilt or innocence of a defendant, and, in a civil case, where the rights of parties are reciprocal, to pass upon the rights and responsibilities of those who are parties litigant.

[491] That is all it means. A doctor takes this witness stand. A physicist takes the witness stand. A man who qualifies as a specialist takes the witness stand. The responsibility for having him qualify is the responsibility of the Judge. But after he does, he's just another witness, that's all. You can reject his testimony, accept it, do whatever you think you should do. So that no matter what happens here, please don't speculate because you can't speculate on what we are doing, because if you do you'll be speculating on the whole panorama of what the Government intends to offer, which has been more or less set forth in opening, which is not evidence, and you would be speculating also upon the position of the defendant speaking through his counsel, and obviously it wouldn't be fair to do that.

So that, with that admonition, please consider this as a day that is not wasted by me, it has been a hard day, but it's a day that is part of the routine by which this Flag

is not put at half-mast. It is put at half-mast if the rights of any of the parties are interfered with. That's why we want to have abodes of peace where men live and let live. That's why we need a government of laws. That's why we must fight to maintain it. That's why we must have a determination of issues free from all forms of racial and religious prejudice. Not predicated upon your likes and dislikes for a judge or counsel, or for a law, for its efficacy, or for its lack of efficacy,—predicated upon the solid beacon lights that are the parts of a golden treasury [492] of a civilization that you and I and these fine lawyers are very, very anxious to preserve. And I speak of this only because I want you to know it is necessary to keep you out because of the importance of these matters, and they are important.

So I am going to bid you good afternoon, God willing. I'll see you tomorrow morning. But I won't be able to leave—I have to stay here.

Now is there anything else that counsel would like to have me say? Is there anything I've said to the jury you feel I shouldn't have said? Is there?

Mr. Koen: I am content with your remarks, your Honor.

The Court: You, Mr. Maguire, too?

Mr. Maguire: Yes, sir.

The Court: All right. I'm glad to do anything that either counsel cares to have me add. Not hearing a response, you all stand indifferent, you may go home.

[The jury retires from the court room at 3:40 p.m.]

Now, I will have to ask everybody to step out except counsel and the defendant.

[The court room is cleared at this point.]

The Court: Now let's go along. Is there anything else you want?

Mr. Maguire: I think the next order of business, if

your Honor please, and I gather it is the main bit of evidence the Government intends to offer, and that is Mr. Isber, and [493] while I appreciate that your Honor doesn't want to go into the merits of it—

The Court: No, I don't think I can. What I am going to do is to settle basically this question. If I settle this question, Mr. Maguire, against the Government, a fortiori I settle Mr. Isber's, I should imagine.

Mr. Maguire: Well, no, if your Honor please, I don't think that is so. It strikes me that there is a very distinct difference. First of all, Mr. Hurst—

The Court: Well, if I have to do that, I'll settle that later on, but I want to settle this now and get along with the trial. If I find it necessary to do that, I'll do it.

Now, do you care to offer any more, Mr. Koen?

Mr. Koen: Mr. Ierardi.

The Court: Haven't I heard enough now on this question? Can't you agree on what Mr. Ierardi would say?

Mr. Koen: I will tell you, may it please the Court, Mr. Ierardi will testify that, on November 8th, Mr. Garrity communicated with him and said he had received a call from a person in Worcester, that he intended to have a conference the following morning, that this man whom he represented in a tax matter named Massei, following a conference he expected that he would receive from that taxpayer a power of attorney. [To Mr. Ierardi] Is that substantially correct?

Mr. Ierardi: Yes.

Mr. Koen: And that subsequently, and I think it was [494] about the 14th of November, Mr. Garrity again by pre-arrangement met Mr. Ierardi, having made arrangements by telephone—I'm not too sure whether it was in person but anyway it was the result of prior arrangement—met Mr. Ierardi and Mr. Ierardi was present together with Mr. Massei, Mrs. Massei, and Mr. Garrity

at the Federal Reserve Bank where a sum of money in the amount of 84 or 85 thousand dollars were deposited.

Mr. Maguire: I don't see that that has a thing to do with what we are after here.

Mr. Koen: Oh, I think it is vitally important, and I think counsel for defendant is missing the very point your Honor is holding this voir dire on. He keeps talking about what evidence we have on this point.

The Court: I have already had that presented, you have made an offer, and I am ready to rule on it, and I am prepared to rule on that now, Mr. Maguire. I am prepared to admit that testimony, and I save your rights. That was separate; I separated that. I gave it a lot of consideration. I am prepared to admit it.

Mr. Maguire: Well,—

The Court: When the time comes, you can save your rights. You remember you asked a question, then you came up here to the bench, as I remember it. Am I right on that? That's right. Then I heard what Mr. Koen's offer of proof was. Very frankly, I was disposed to exclude it; but I gave [495] it some consideration, and I waited, and I have decided that it is admissible.

Mr. Maguire: Well, both now and later, please save my rights.

The Court: Oh, certainly. That's right. And I want you to be sure and save them at the time. This was another question.

Mr. Maguire: That is correct.

The Court: You mean this bears upon the question of the power?

Mr. Koen: Are you addressing that to me, sir?

The Court: Yes. I am going to admit the evidence anyway. So that the question is now moot, isn't it, as far as I am concerned?

Mr. Koen: Now, your question is as to whether I think the evidence which is to be offered tomorrow--

The Court: No, bearing upon the simple issue that's before me. Does it come within the orbit of the special inquiry that I am making, namely, on the question of authority?

Mr. Koen: Your Honor will remember one of the first things that were introduced by me was a copy of the letter dated November 7, 1951.

The Court: That's right.

Mr. Koen: The return receipt signed by the defendant on November 8th.

[496] The Court: That's right.

Mr. Koen: Immediately thereafter there is a telephone call to Mr. Ierardi.

The Court: That's right.

Mr. Koen: There's a statement of a conference attended the next day, at which the power of attorney is expected to be executed, and then immediately following that the defendant, to whom this letter is addressed, with Mr. Garrity, who communicated with Mr. Ierardi, the very next day following this comes down and makes arrangements and deposits $84,500 in the Federal Reserve Bank.

The Court: Do you agree, Mr. Maguire, that Mr. Ierardi will testify to that? That evidence has gone in on that, the letter.

Mr. Koen: That has gone in on the voir dire.

The Court: Yes, that has gone in on the voir dire already. The next step is the step of meeting Mr. Ierardi and going through the mechanics of whatever the conversation was about putting up a sum of money.

Mr. Koen: The conversation and the delivery subsequently of the money.

The Court: That's right. I have allowed you to interrogate him on that.

Mr. Maguire: As of this minute, you have admitted it on this particular examination, your Honor. Is that right? [497] The Court: No, I admit it in connection with—you remember you objected and I admitted the latter part. That was already in. I will admit this as a part of the general picture of authority, on the question of authority.

Now I will be happy to hear any arguments. Now I would like to hear from—I wish you could confine yourselves to five minutes. I have gone over your briefs. Can you? I will hear from you, Mr. Koen.

Mr. Koen: On the narrow question of—

The Court: That's right.

Mr. Koen: On whether there is—

The Court: On the narrow question of authority on the part of the attorney to speak for his client and bind his client.

Mr. Koen: Mr. DiMento will argue, may it please the Court.

Mr. DiMento: Your Honor, I am only going to repeat in large measure the brief we have already filed. I spent just a little time on the question whether an agent's admission may be received in evidence against his principal in a criminal case. I notice that Mr. Maguire does not touch upon that, and I assume he concedes it. There is ample authority for it, anyway, in Wigmore; and in the American Fur Company case, the quotation I have in the brief. We will rely in large measure on the three cases cited of Banks, Himmelfarb, and Shibley, particularly the [498] Shibley case.

Now, as the brief states, in the Banks case it should be noted that the attorney himself was compelled to testify against his client on the witness stand, and I have mentioned that in the brief only to allude indirectly to the

last part of defendant's brief which dealt with morality in this case as if it had never been done before, that is, putting in an attorney's extrajudicial statements. Not only has it been done before, but the attorney himself has been put on the stand, and I think this case runs or is a fortiori from the Banks case.

Now, the Himmelfarb case is an even stronger case than the present one. There the attorney made the statements to an accountant hired by him; he made the statements not to a special agent but to his own accountant, and yet the Court allowed the accountant to take the stand and testify as to the information received from the attorney.

The Shibley case contains language which directly and precisely describes opposition. What we are saying here, your Honor, is that the defendant hired an agent who was also an attorney at law. He hired an agent not to conduct litigation necessarily, not to manage a cause, as Wigmore says, but to speak for him during the investigatory stages of the proceeding. In order to do that, he had to arm his attorneys with the facts. He gave the attorney authority to disclose that information. Now when I say he gave, I mean he impliedly gave. We can reasonably [499] conclude that he gave his attorney authority to disclose such information as the attorney thought would benefit his client.

Now, I don't pretend to be second-guessing Mr. Garrity. At the time those statements were made to the agents of the Internal Revenue Service, Mr. Garrity was unquestionably relying on the state of the law at that time. And I'm just guessing now. I assume he was relying on the Bryan and Fenwick cases.

Well, time has passed now and we have had cases from the Supreme Court and we have had Circuit Court cases. So that time has proved that perhaps the statements were not as beneficial to the clients now but in his best judg-

ment they were beneficial to his client. And for myself, I could say I would have done the same thing. That was the standard operating procedure of attorneys at that time when they were dealing with these net worth cases, and Mr. Garrity did not deviate one iota.

Yet, a criminal defendant, a taxpayer subject to investigation cannot expect to hide behind his attorney, have his attorney go up and give a story to the special agents with the hope that the story will be swallowed. Now when I say that, I don't mean the attorney is contriving a story as part of a lie; the attorney must believe his own client; but the taxpayer hires the attorney to have the special agents swallow a particular story. Now, if the special agent believes the attorney, believes the facts set forth before him and any arguments as to those facts, the case will be closed and the taxpayer has the full benefit of the statements made by him through his [500] attorney. However, if the agent chooses to go on, if the attorney is unsuccessful, the taxpayer, under the rule proposed by Mr. Maguire, would be able to disavow all his attorney's statements and hide once again behind the privilege.

That is why I quote in such length from the Shibley case, which states in the last sentence that I have quoted—

> "But when the client and attorney himself, for purposes beneficial to the client, lift the veil, they cannot lower it again."

The Court: That's a California case, isn't it?

Mr. DiMento: That's a District Court case, your Honor, a Federal District Court.

The Court: In California.

Mr. DiMento: In California, which makes reference to California law. But this is the kind of law that is universal. The defendant in that case was an attorney who had made certain statements to a military board.

The Court: You know, I am very happy to have you

say that what Mr. Garrity had done, and I want to say it in the presence of his client, is what the ordinary lawyer would have done. There is no doubt about that.

Mr. DiMento: That's exactly right, your Honor. Not only does the lawyer do that, your Honor, in those cases, but the lawyer in many cases has had his own clients come in and make the statement, and then he simply puts on the client's statements. In this case that was not done, so we were forced [501] to put in the attorney's statements.

The Court: There is going to be a situation created, and I am not responsible for it—all I do is administer the law—where you could carry that right down along to the office of the District Attorney. A lawyer can come down there and make a statement about his client and the Assistant District Attorney can get it out of him on the theory, well, he's going to get some assistance and then take the witness stand and introduce the statement against him.

Mr. DiMento: Well, your Honor, that's another point I was trying to make. An attorney who comes down to the office of the United States Attorney is an attorney charged with, as Wigmore says again, the management of a cause. Now I do not contend—

The Court: Is he charged with the management of a cause when he is pleading his case before a board that has it within its discretion to recommend the prosecution or not recommend the prosecution?

Mr. DiMento: When I say the management of a cause, I am think the attorney in our office is there to conduct the litigation and take care of matters surrounding particular litigation. Now I don't say, for instance, if Mr. Maguire in this case would say something out in the hall to anyone, that binds his client. However, if his client hires him for the purpose of making statements, then he is bound by those statements; [502] and I think—

The Court: You mean if the course of conduct is such that it impliedly indicates that; is that what you mean?

Mr. DiMento: Yes, your Honor.

The Court: Let me ask you this, Mr. DiMento. I am not putting you on the spot. I don't mean to. But I could probably ask Mr. Koen, but I think you can answer it. Is it the contention of the Government that upon the assumption the jury believes this defendant picked up this sum of money while he was a police officer patrolling a route on Shrewsbury Street, whether it was in the way of bribes or gifts, from those who were carting liquor in those prohibition days through Worcester, that it is admissible under this net worth theory, at least on one ground anyway, and that is his status as a police officer never changed after, when the statutory period began to run and that he could have had the same opportunity to have gotten money in connection with his duties as a police officer in an ill-gotten way.

[503] Mr. Di Mento: That's right, your Honor.

The Court: I understand that is one of your reasons.

Mr. Di Mento: That is one of our reasons, your Honor. We have more than this. We have evidence of more than graft or gifts taking during the prohibition years. Mr. Hurst alluded to gifts or graft, or call it what you may, from bookies, as well, after that period. We are going to show you, your Honor, a defendant with 25 years of experience in taking graft who remains on the police force thereafter during the indictment years, remains on the police force, and whose net worth continues to increase.

The Court: You are going to argue that?

Mr. DiMento: Yes, your Honor.

Mr. Maguire: May I get clear on the record—

The Court: This is only argument.

Mr. Maguire: I appreciate that, and I think Mr. Di

Mento is through. This, I take it, is the government's position on the relevancy of this evidence.

Mr. Koen: It was a direct answer to a question by the Court.

The Court: I asked if that was one of the theories behind it.

Mr. Maguire: I wonder if we could get clear for the record—

The Court: I am not going to specify why I admit it. [504] I am either going to admit it or exclude it.

Mr. Maguire: If your Honor please—are you through?

Mr. Di Mento: Yes.

Mr. Maguire: If your Honor please, I want to say right off, for the record, I feel very strongly about this and I want to say, categorically, I think it is the most outrageous procedure I have ever seen in a court room.

Passing that, the legal problem, the first is the question of competency. That, basically, is, is Mr. Garrity authorized to make these statements he is alleged to have made to Mr. Hurst. It is clear from Mr. Hurst's testimony there is no evidence as to the scope of the power of attorney which was filed so that doesn't help us. It is also perfectly clear from the cases, your Honor, that being an attorney at law does not authorize him to make these admissions, so the evidence which was put on here is to show a course of conduct by Mr. Garrity, as the taxpayer's representative, which would lead you to say this is admissible as being authorized by his client.

Now, we brought out from Mr. Hurst that his course of conduct during the investigation stages was the turning over to Mr. Hurst of what we describe as documentary evidence, bankbooks, checks, etc. In addition, Mr. Garrity wrote either four or five letters directed to Mr. Hurst, as Mr. Hurst testified, in response to Mr. Hurst's requests for information. Those were sent by Mr. Garrity over his

signature, to the Agent. That is the [505] same sort of testimony which you have in the Banks case, which was referred to earlier, where the attorney got written questions from the Agent, took them to his client, had them answered and then brought them back again. In other words the attorney was nothing more than a conduit. That is exactly what we maintain Mr. Garrity was in furnishing these letters.

We come to the question now as to whether or not he had the authority from his client to state that he was taking gifts back in prohibition days and that he was taking gifts during his tenure as head of the vice squad.

The Court: His client was beside him when he said it. A witness testified that.

Mr. Maguire: No, if your Honor please.

The Court: He said it outside the bank, or some place.

Mr. Koen: In a conference room.

Mr. Maguire: Well, if your Honor please, I was directing my remarks immediately to Mr. Garrity's conference at the Treasury. I will come to that other.

I will say to your Honor, just as strongly as I can, that that evidence, to my mind, is clearly inadmissible, just isn't competent, if your Honor please, and I will wager in all your long experience as a district attorney and as a Court you have never heard anything in your life like it. The cases the government attorney has cited, for instance the Shibley case, there again, if your Honor please, the defendant, in the course [506] of his representation of his client, sent to the Commandant of the Marine Corps certain letters and commissions. The California District Court case.

We do not object to the admission of the letters which Mr. Garrity sent to Mr. Hurst, there is no objection to those at all, your Honor, but we definitely do object to alleged admissions made by him in the course, as Mr. Hurst

described it, in the course of arguing with Hurst that there was no source in this case, I submit that evidence is definitely incompetent.

Assume, for the minute, you find it is competent, the next question arising is whether or not it is relevant and, if relevant, whether material. Let's take the liquor, back in prohibition days. If your Honor please, this case has always turned, one of the main issues in the case has been the proof of source by the government. Under the cases, your Honor, they do that in two ways. First, they show an income producing business. That is the Holland case, with the hotel, and it is the Johnson case, with the gambling establishments. Or they do it by specific items of unreported income, which is the Chapman case, where they bring in seven meat peddlers testifying to an over-ceiling payment, and the Skidmore case where they have some people writing book who came in and testified they paid protection.

In the Holland case, that uses the word "likely source". In this Chapman case with the meat peddlers, the [507] likely source in that case were these over the ceiling payments for meat. Those seven people that were brought in as witnesses were not brought in to demonstate the exact amount that the government alleged was owned in taxes; they were brought in to demonstrate a likely course. But there was definite evidence of that.

In the Holland case, with which your Honor is familiar, I think you know the extent to which the government went to prove source. They showed the hotel owner, who was the defendant's predecessor, and how the income had come up and how, in effect, what he declared in his tax return fell off 75 or 80 per cent.

There are two additional problems, if your Honor please, in connection with this admission, even if you get to the point that it is competent and that it is relevant, both of

which I say it is not. Coming back to the relevancy, I don't see how an admission that he took gifts back in prohibition days has any bearing whatsoever on the source of his income for the years for which he has been indicted. It has no bearing whatsoever, your Honor.

We have cited in our brief assuming that this admission is competent, that it is relevant and material, we have cited in the brief an admission standing alone has to be corroborated. That is the Smith case which went to the Supreme Court and I don't think I can do any more than refer you to the brief on [508] that point.

There was one further point not touched upon in our brief and I would like to call it to your Honor's attention, in answer to the bill of particulars filed by the government, the question in the motion for the bill of particulars which your Honor ordered the government to file an answer to: Comes the defendant and moves the Court order the attorney for the United States to file particulars stating: 1. The source or sources of the defendant's alleged unreported income for each of the calendar years 1946 to 1950, inclusive. That is one of the elements of this case.

This is the answer in the government's bill of particulars: The likely source of unreported income of the defendant is monies received by the defendant as an individual from many persons engaged in various illegal activities for the performance by the defendant of his official duties as a member of the Worcester Police Department, for the non-performance of the defendant of his official duties as a member of the Worcester Police Department, and for the performance by the defendant as a member of the Worcester Police Department of services rendered to such persons in connection with such illegal activities.

The government, by its answer, if your Honor please, has stated that the theory of its case is that they are going to come in with evidence of specific items of un-

reported income and [509] I say that within the purview of this bill of particulars they can't start with some alleged admission away back in prohibition days or even during the late '30s, up to 1943.

I can only repeat, if your Honor please, and I am reverting to the question of policy, and if I may say so I appreciate your Honor has to rule on this as the law is, but I have seen no cases, if your Honor please, where an attorney making a legal argument in behalf of his client has had those words thrown back in his teeth in the court room.

The Court: If I had before me anything which constituted a contention—if I had that, then I wouldn't be so concerned.

Mr. Maguire: If I may interrupt, please. You will recall Mr. Hurst on the stand on at least two occasions—

The Court: He had no right to use that word—

Mr. Maguire: How else is he going to get—

The Court: It is for the Court to say whether it is an argument or not.

Mr. Maguire: He was the fellow sitting there. He describes it as a legal argument.

Mr. Koen: I don't think he used that word.

Mr. Maguire: He used the word "argument" on two occasions.

Mr. Koen: But he didn't say "legal argument".

The Court: It is for the Court to say whether or not—[510] it was a statement of where this money came from at a time when the statute of limitations had run against him for the prosecution under the Internal Revenue statutes. He couldn't have been prosecuted and he said he got this money previous to 1945, as I understand it. He had already, or during the course of these proceedings, Mr. Massei had come to him and made the statement to Hurst that he got it.

Mr. Maguire: If your Honor please, as to the defendant's alleged statement to Mr. Hurst in Westerly, it is admissible if it is relevant. Now that we will come to—

The Court: My conception of what I consider to be the sacred character of the relationship between client and attorney, liberalized clearly, as counsel for the government has said, by the decisions of the United States—

Mr. Maguire: Well, if your Honor please—

The Court: Now they have been liberalised in these net worth cases and my job is the job of administering the law. I am entirely and absolutely out of step—I have as much right to say it as someone else has to criticise the decision of the Supreme Court without justification, when I know they are right, on segregation—I have a right to comment on contradictory decisions in connection with the religious training of children. Under the McCullom case, the Oregon case and the New York take-out time case, the fact is if the McCullom case is the law of the land, I have to follow it.

[511] Mr. Maguire: If your Honor please—

The Court: You asked me if I believe it is a good law and of course I do not.

Mr. Maguire: If your Honor please, in this case—

The Court: I expect to have some person put on the witness stand and force him to divulge the secrets of a communication which comes either through a confession in the Catholic Church or through a confessional in the Episcopal Church.

Mr. Maguire: I earnestly submit I have seen no case cited by the government which says this evidence is admissible.

The Court: For example, you speak about Wigmore on Evidence and when was it the Himmelfarb case came down?

Mr. Di Mento: 1949, I believe.

The Court: That isn't of recent origin, and the statement in Wigmore on Evidence—

Mr. Maguire: If your Honor please, I don't think the Himmelfarb case bears on this problem before you at all.

The Court: That case, on page 927, the Court stated

> "Special circumstances may show that client impliedly authorized attorney to make disclosures to third person so as to remove privileged character of communications between attorney and client."

That is a quotation right from that decision.

Mr. Maguire: That, if your Honor please, applies to an [512] accountant.

The Court: I read it and I dictated it to my secretary. I don't think it is dictum, Mr. Maguire. There are some other quotations.

I am going to give this matter more consideration and I will rule on it tomorrow morning.

I want to say, so that there will be no misunderstanding, I think that 99 lawyers out of 100 would have done just what Mr. Di Mento says—what he says is true. He says what Mr. Garrity did is what 999 lawyers out of 1,000 would have done in their efforts to get their clients straightened out. The difficulty is that I can't decide these rules—if I could decide it that way, I wouldn't hesitate. My problem is a series of circumstances.

I am very much impressed with your argument, Mr. Maguire, and I will give it some thoughtful consideration and I am in sympathy with many of the points you make, but you can't blame these fine lawyers. They have a duty to perform. If you were downstairs you would be doing the same thing.

Mr. Maguire: If your Honor please, that I certainly quarrel with. Please the Lord, I would never come into a court room with a case such as this.

The Court: You would if the Attorney General of the

United States directed the United States Attorney to go up and present it. Not everything that the United States Attorney [513] presents is a case he likes to present.

[Discussion off the record.]

The Court: I will take it under consideration. I will decide tomorrow morning.

[Adjourned to 10 a.m. Wednesday, April 11, 1956.]

[514] SEVENTH DAY

Court Room No. 5,
Federal Building, Boston.
April 11, 1956.

[Without the Jury.]

The Court: After a voir dire examination in a closed court room, the defendant having been present and having waived any constitutional right to have the public present at the examination, it is the considered judgment of the Court that the evidence which the government has stated it will offer is substantially admissible.

This ruling is limited to the question of the authority of the agent to speak for the government. Other grounds for exclusion very obviously should be raised, and I assume will be raised very properly by Mr. Maguire, at the appropriate time.

Now, I am also going to rule, and I want the United States Attorney's office to know it and counsel for the defendant, that the ultimate question of the authority of the agent to make admissions binding upon this defendant will be for the jury, under instructions which the Court will consider proper at the appropriate time.

[515] [The jury entered the court room at 10:50 a.m.]

The Court: All right, the Government may proceed.

Mr. Koen: I had intended at this point to call Mr. Isber, may it please the Court, because he is an attorney who has been under summons here for five or six days, and

I don't want, because he is engaged in the practice of law, to keep him here.

The Court: No, I made that position clear to the United States Attorney at the time that—I have to follow the same formula. I have ruled on all the testimony with the exception of that which the Government claims is his, and I haven't heard that yet, and I ruled on what was offered yesterday, and I will rule on him later on. Mr. Maguire has expressed a desire to have a voir dire examination, and I am going to give it to him.

Mr. Koen: If the Court's purpose was as stated yesterday and the conclusion which you have stated this morning is sound, then I can see no sound reason for—

The Court: No, I would rather not have any discussion in the presence of the jury because it might be prejudicial. That is the way it will be done. If you insist on having him now, I'm not going to disturb the order of events or the United States Attorney.

Mr. Koen: I have stated to you, sir, the purpose of offering the testimony.

[516] The Court: I will exclude the jury and it will be heard through the same formula that I went through before. That is what Mr. Maguire has asked and desires. Didn't you ask for that yesterday?

Mr. Maguire: That is correct.

The Court: Well, I will give it to you. If it is the wish of the Government that that be settled now, I'll settle it, Mr. Koen: Yes, I think it is fair to the Government and fair to the prospective witness so he may be relieved from the burden of the subpoena and go about his business as a practicing attorney.

The Court: Has he complained about being here? He is here now.

Mr. Koen: He hasn't complained about it, but I still

think it is unfair to compel a man to stay here five or six days if I can get rid of him.

The Court: He hasn't been here five or six days. He came in here and went out. Isn't that right, Mr. Isber?

Mr. Isber: I was here a short time.

Mr. Koen: He has been here under summons and I have excused him at various times when he had other things to do.

The Court: If you want to have his testimony presented I will hear it.

Mr. Koen: I wish we could do that, sir.

[517] The Court: All right, I'll be happy to do it, and I am going to ask the jury—it's the Government's right to ask for that, and it is the corresponding right of Mr. Maguire to ask for the same procedure, and I will follow it. It's the safe way to do.

[To the jury]. I am going to ask you to leave now. It won't be so long this time.

[The jury retire to the jury room at 10:53 a.m., and the court room is cleared of all spectators, only counsel and defendant remaining.]

[518] PROCEEDINGS ON SECOND VOIR DIRE

CHARLES J. ISBER, *Sworn.*

Direct Examination by Mr. Koen.

The Court: All right, Mr. Koen.

Mr. Koen: May I ask you, sir, if this is a new voir dire or if it is a continuation of yesterday's voir dire?

The Court: I would say this is a continuation of the old voir dire.

Mr. Koen: All right, sir.

Q. Your name, sir? A. Charles J.—

The Court: May I say at the start that I have settled

the question of agency. That has been covered by what I have done here.

Mr. Maguire: Well, if your Honor please, you have already ruled that it is a jury question.

The Court: That is right.

Mr. Maguire: As to whether there was agency at the time of the January 24, 1951, conference between Hurst and Garrity. Now we have—

Mr. Koen: No, wait.

Mr. Maguire: Is that right? Now I believe we are going to take up the conference which occurred—I am not sure of the date, and I think the circumstances surrounding that conference and so forth are important.

[519] The Court: Well, that is what we are going into now. That is what we are going through now.

Mr. Koen: Now may I at this time ask what particular—or may I inquire of the Court exactly what this voir dire, which was requested by counsel for the defendant, is expected to establish in view of your previous ruling?

The Court: He has asked for a voir dire examination for the purpose of showing this evidence isn't proper evidence to be submitted to a jury. I don't know whether it is or not. I don't know what it is. All I am doing is hearing it now in the absence of the jury, the same as I did before. I haven't any idea what it is. I certainly wouldn't ask this witness, as friendly as he is with me, because it is none of my business.

Mr. Koen: In the light of the previous ruling, I am unable to follow the reason for this, but if you say you will receive it, I will go forward.

Q. What is your name, sir? A. Charles J. Isher.

Q. Where do you live? A. 24 Concord Avenue, Cambridge, Mass.

Q. And what is your profession? A. Attorney at law.

Q. You are now engaged in the general practice of law; is that correct? A. Yes, sir.

[520] At some time in 1952, were you attached as counsel to the Internal Revenue Bureau? A. Yes, sir.

Q. Pardon me? A. Yes, sir.

Q. Where were your headquarters then, sir? A. At that time, I believe they were either at 55 Tremont Street or the Federal Building. I am not certain.

Q. What was your position or classification at that time? A. Well, my position was to pass on the evidence submitted by the agents as to whether or not it warranted recommendation for or against criminal prosecution in tax matters.

Q. Now, sir, were you aware of the regulations which existed at that time with reference to powers of attorney and enrollment cards of representatives of taxpayers? A. Yes, sir.

Q. Was there a practice and a custom conducted by you in the course of hearings held by you in tax matters where counsel were present? A. Yes, sir.

Q. And what was that custom and practice, sir?

Mr. Maguire: I wonder if we are not only interested in what happened at a certain conference, sir?

The Court: You don't deny it was the custom and practice to have an authorization to appear? You don't deny [521] that?

Mr. Maguire: Well, I don't know. I think the only thing we are interested in is what happened on this particular occasion.

The Court: What?

Mr. Maguire: The only thing I think we are interested in is what happened on this particular occasion.

The Court: Well, Mr. Koen is going to offer him, apparently, for the purpose of having Mr. Isber say he

wouldn't talk to anyone. Isn't that right—unless they had the proper authorization to speak?

Mr. Koen: And that is what I expect the witness will say, sir.

The Court: You don't dispute that, do you? They have to do that.

Mr. Maguire: Well, I appreciate, your Honor, that it is usual for a power of attorney to be filed. I mean, it is the practice. I don't know. I will let Mr. Koen go ahead. Let's see what it is. Go ahead.

Q. Will you answer the question? A. A representative of a taxpayer requesting a conference before me was obliged to have a power of attorney on file, in accordance with treasury rulings and regulations. It is more than a practice or custom: it was a definite requirement that you had to file powers of attorney before you were permitted to [522] appear before in this particular—before you were able to appear before the Treasury in any matter, and particularly in these cases there was a power of attorney required, in accordance with treasury regulations.

Q. Before you afforded a conference in connection with tax matters, sir, did you satisfy yourself that the requirements of the regulation had been met? A. Generally, yes.

Q. Would a conference have been granted to anybody representing a taxpayer,—granted by you in the absence of satisfaction of requirement of the regulation? A. If I knew that the regulations were not satisfied, I would tell the representative that he—that I am not allowed to give him a conference.

Q. You mean by that, sir, when a conference was granted you had obtained in some way to your satisfaction knowledge that the requirements had been met? A. Yes.

Q. Can you now tell us—this being 1956—in a specific case, what information you had which indicated to you that the requirements had been met?

Mr. Maguire: In this case, Mr. Koen, please.

Mr. Koen: No, I haven't asked for that. I have asked a very general question.

A. Would you please repeat the question?

[523] Mr. Koen: Would you read it?

[Last question read.]

Q. Let me amend that by saying the calendar year 1952. A. In this specific case?

Q. No, I am talking about any case you handled in 1952 in your capacity as counsel for the Bureau. A. My recollection is that in all the conferences that were granted, our office requirements had been met.

Q. And if you conducted a conference in May of 1952, and particularly on the 20th day of May, 1952, would the fact that a conference was held and granted to one representing a taxpayer in, we will say, this case of William V. Massei, mean that the requirements of the regulations had been complied with, sir? A. I would say yes.

Q. Now, directing your attention to the 20th of May, 1952, was a conference conducted concerning the tax matter of William V. Massei at which one W. Arthur Garrity was present representing the taxpayer? A. I can't remember the date, but I recall distinctly that there was such a conference, but I have no idea of the date. My memory as to the date—I can't remember the date.

Q. I show you this document, sir, and I ask you,—a 3-page document,—and I ask you to examine it, sir. A. [After examining]. I have examined it.

Q. Does that refresh your memory, sir, as to whether a [524] conference was held on the 20th of May, 1952, in relation to the tax matter involving William V. Massei? A. Yes, sir.

Q. Does that refresh your memory as to who represented the taxpayer on that occasion? A. Yes, sir.

Q. Who represented the taxpayer on that occasion?
A. W. Arthur Garrity, Junior.

[525] Mr. Koen: Do I understand, may it please the Court, that you are going to determine on this voir dire the admissibility or non-admissibility of this evidence?

The Court: I am going to give it the same weight as I gave the others on the question of agency.

Mr. Koen: Will your Honor pardon me just a moment? [Brief pause.] I have no further questions of this witness.

The Court: I would like to know what it is. I can't rule on it unless I know what it is. The other witness testified what he was going to say. I don't know what he was told.

Mr. Koen: Apparently I am not too astute but I thought we were dealing merely with the limited question of agency.

The Court: The agent that left the service, he testified, allegedly, to what Mr. Garrity told him in several places and I have ruled on that and I don't know what is in that; I haven't any idea what it is. He says that that is a statement he made. What is it? Tell me what he said. Did you keep that in the regular and ordinary course of business?

The Witness: Yes, sir. This was filed, a memorandum made of the conference, dictated and filed.

The Court: I hope you don't have any objection to what I am saying. I am only doing it for the purpose—there is nobody here. I don't want to cause any prejudice.

Mr. Maguire: No.

[526] The Court: You did this pursuant to a directive from the department? It was your custom, in other words, after someone left or while they were there, to make notes—

The Witness: That's right.

The Court: —or some time to reduce what was said to writing?

The Witness: That is correct.

The Court: And to leave it as part of a record of the case?

The Witness: That is correct, as part of the file.

The Court: Because you had so many there, you had to do that?

The Witness: Yes, sir.

The Court: Does that refresh your recollection?

The Witness: It does.

The Court: Well, what was it?

Q. What was the date of that memorandum, sir? A. It is dated May 21st, 1952.

The Court: Could I look at it? Probably it would save time if I took a look at it.

Mr. Maguire: If your Honor please, as I understand, Mr. Isber is going to testify—he has testified that this memorandum refreshes his memory so I assume he is going to testify—Mr. Koen wants him to—he will testify without reference to the memorandum.

[527] The Court: He can use the memorandum to refresh his recollection. He can look at it and then, using that to refresh his recollection, say what Mr. Garrity told him.

Mr. Maguire: Using it so he will be testifying from present memory, your Honor,

The Court: He is a lawyer; he knows how to do that.

Q. Is that a record, sir, that was made by you in the ordinary and usual course of your duties as counsel for the Bureau of Internal Revenue? A. Yes, sir, it was.

Q. And from that document that you have in front of you, can you tell us now when, with reference to the hearing date—conference date, rather—of May 20, 1952, that memorandum was made? A. That was made the very next day. It is dated the next day.

Q. And the contents of that document were dictated to

somebody by whom? A. It was dictated by me, since it bears my signature.

Q. And have you read that document, sir? A. Yes, I have.

Q. And does it bear a signature on the third page? A. It bears my signature on the third page.

The Court: You must have read it over before you signed it, didn't you?

The Witness: Yes.

[528] Q. The signature that appears on that, sir, was that made at or about the time at which the memorandum was dated? A. Yes.

Q. All right, sir. Now, have you read that document in its entirety? A. I have seen the document, read it, yes.

Q. Does it serve to refresh your recollection and memory of the events of May 20, 1952? A. It substantially does.

Q. All right. Using that to refresh your recollection, and you may refer to it when your memory lapses somewhat, will you tell us what happened on the 20th of May, 1952 at this conference, or conference of which this is a memorandum? A. The question is what happened. Mr. Garrity obviously came in to see me and, to persuade me that the recommendation for prosecution should not be made.

Q. By the way, let me interrupt you for a second. At whose request was this conference held? A. Mr. Garrity's.

Q. Beg your pardon? A. Mr. Garrity's.

Q. Go ahead. A. And Mr. Garrity came there for the purpose of presenting certain facts to convince me that a recommendation of no prosecution should be made. Now, that—he didn't say—he didn't use [529] the words I just said but that was the purpose of this conference.

The Court: Let's get away from the purpose of the conference. What he said. I have to decide whether or not these would come within the scope of the ruling I have made, and if they don't, of course I can't admit them.

If they do, they are admissible, clearly, because I have already determined that. That is what you have been anxious, Mr. Koen, to have me say. I don't want to go beyond that.

The Witness: The substance of the statements made by Mr. Garrity was the increase in net worth during the years under investigation did not represent current income to Mr. Massei but that those increases in net worth represented the results of a cash hoard accumulated by Mr. Massei prior to 1945.

Mr. Garrity stated further that during the years, in the '30s, he was on the vice squad and as a result of being on the vice squad he was able to accumulate money, graft and gifts, which he saved.

Q. Now— A. That—

Q. All right; go ahead. A. That subsequent to the '30s he was promoted but his duties shifted from the vice squad and that during that period of time, which would be before 1945, he was not in a position to obtain any of this type of money since this particular job didn't call [530] for it and that isn't the words he used, but that this particular job did not enable him to make such monies; that he bought a lot of insurance; and that in the years under question, subsequent to 1945, the increased net worth came from this cash hoard which Mr. Massei had accumulated prior to 1945, as I have just indicated. That, in substance, is what Mr. Garrity stated to me. There are other details about gambling—yes. What I said before, cash hoard was the result of bribes, gifts and gambling activities. That, in substance, is my memory.

Q. All right, sir. Let me ask you this, if I may: Did Mr. Garrity tell you what the taxpayer was—whether or not the taxpayer was on the police force at the time of this conference? A. I don't believe I understand your question.

Q. At the time that this conference was held in May of 1952 was there any statement as to whether or not Mr. Massei was then, on that date— A. In 1952?

Q. On the police force? A. My memory is that he wasn't at that time.

Q. Following your testimony, sir, was there any discussion between you and Mr. Garrity as to the positions that Mr. Massei held while on the police force in any greater detail than you have given them to us now? Will you use that to refresh your recollection, sir, and tell us? [531] A. Without looking at it, I do recall—

Q. You look at it, sir.

The Court: I think you better look at it. By the way, Mr. Isber, in connection with this work that you did did you have a secretary there taking notes?

The Witness: No. My memory is that I made the notes. We didn't have a stenographer.

The Court: You usually made notes, did you?

The Witness: Yes. My memory is that I made notes and then after the counsel leaves I call in the girl and dictate it and what I do with her notes I don't recall whether I put it in the file or destroy it. But of course this is the typewritten memorandum that embodies the conference.

The Court: And did you do that because you were more or less continuously busy?

The Witness: Oh, yes. I didn't trust my memory because we had many things to do.

The Court: Were you attorney? As I get your position, there are so many lawyers—don't misunderstand me, Mr. Maguire—there are so many lawyers in the Treasury Department, they have always been there.

The Witness: Yes.

The Court: I can recall a man, I forget his name now, he lived in the apartment where I am and he told me one

day he was the head or assistant head of some division in the civil side.

[532] The Witness: Yes.

The Court: Later on I can remember when the Textron matter was before a Senate committee, at which some prominent men testified, that he was their examiner.

The Witness: There was a Textron examination by Senator Tobey. That was Mr. Edwards.

The Court: That is a different division?

The Witness: Entirely. Civil and criminal.

The Court: The cases were processed through to the department where you were?

The Witness: Yes.

The Court: Who was your associate at that time? Did you have some other lawyer?

The Witness: In 1952 I think Mr. Altkrug was my associate. That is my memory.

The Court: And these hearings were held, that is was it a part of the routine or the structural setup of your office to have them held and then have your recommendation go some other place?

The Witness: After a hearing we would make a determination and we would forward it, at that time, to Washington.

The Court: When you use the phrase with "hearing", all you mean is you have given a person an opportunity to come in and make a statement?

The Witness: That is correct.

[533] The Court: Either through himself or through his counsel?

The Witness: That is correct.

The Court: That is what you mean by a hearing. There was no one put under oath?

The Witness: Sometimes, but not in this case.

The Court: Usually it wasn't done before you, was it?

The Witness: Usually not.

The Court: I wanted to get the picture. All right. Pardon the interruption, Mr. Koen. Have you read that over? Read it carefully.

[Brief pause.]

The Witness: He was a sergeant in charge of the vice squad in the '30s.

Q. Can you tell us, using that to refresh your memory, how many men were assigned on that vice squad? A. Yes. He had a small group of about five.

Q. Who was in charge? A. Mr. Massei.

Q. Do you remember the dates? Does that serve to refresh your recollection as to the dates, if any were mentioned? A. Yes. From '32 to '33. About a year. 1932 to 1933. And then he was back again in 1934 until 1936, until June, 1936.

Q. And was there any discussion as to when he returned, if he did, after 1936? [534] A. Yes. He was removed from the vice squad and returned in 1938 and was there until June 1943, which was the end of his vice squad duties.

Q. Now, was there any discussion as to the official duties that Mr. Massei performed following 1943? A. Following 1943? Is that your question, Mr. Koen?

Q. Yes, sir. A. Yes. From 1943 to 1951 he was doing personnel work, instructing police, new police, and he had some licensing board duties, the latter being until October, 1949.

Q. Was there some discussion at that time as to the type of duties that the defendant Massei performed as a member of the licensing board or in connection with his duties for the licensing board? A. Yes. That related to taxis, peddlers licenses.

Q. Was there some discussion, sir, as to whether or not that embraced his duties in connection with the licensing board, embraced liquors? A. There was, and Mr. Garrity

didn't think that it did, that the licensing board had nothing to do with liquor licenses.

The Court: That is, he told you that?

The Witness: He stated that. He stated that he didn't believe that it did relate to liquor licenses.

Q. Was there some discussion, sir, as to when Mr. Massei became a lieutenant? [535] A. There was.

Q. Tell us what the discussion was with reference to that. A. Mr. Massei, the attorney stated that Mr. Massei became a police lieutenant in 1947 and that he had a serious motorcycle accident in 1931 and that his retirement from the police force indicates that he had an excellent record there.

Q. Now, did you have some discussion with Mr. Garrity at this conference, or did Mr. Garrity tell you how the taxpayer, Mr. Massei, had received these monies? A. Yes.

Mr. Maguire: You mean over and above what he has already testified to, Mr. Koen?

Mr. Koen: Yes. I am going into the details now.

A. [Continued] He said, Mr. Garrity said that the taxpayer told him that he had gifts, that he received gifts from many people and that during prohibition while Mr. Massei was on the vice squad every truck loaded with liquor that passed through Worcester would make a gift to him and that Mr. Massei did not believe that these gifts were income and for that reason were not reported.

Q. Did you have some discussion about the returns for 1945 to 1950? A. Yes, sir.

Q. Tell us, if you will, please, what Mr. Garrity said with reference to the income tax returns for 1945 to 1950. Wait a [536] minute, Mr. Isber.

[Brief pause.]

Mr. Koen: All right, sir?

The Court: Oh, certainly.

A. Mr. Garrity stated that the returns for those years were accurate and that the deficiencies claimed by the gov-

ernment during those years came from gifts or bribes prior to these years when he was on the vice squad and he was in a position to obtain them, these so-called gifts.

[537] Q. Was there some discussion between you and Mr. Garrity as to the effect of certain decisions of different courts? A. Yes, sir.

Q. Tell us what was said, your best memory as to what was said in that connection, using that memorandum to refresh your memory. A. Mr. Garrity argued, I note here, that the decisions of the courts in net worth cases bear out his contention that in this particular case the Government has a very weak foundation.

The Court: If that evidence is offered, I will exclude it, so there will be no need to— That is a contention, that is an argument, and anything that is a contention I am going to exclude, so there won't be any— I am not going to have anything go in that is a contention or an argument, whether it's by the Government or the defendant. I'm only having this voir dire examination for a precise purpose and that is all. Whatever anyone may say about reading, about the interpretation of decisions of a court of competent jurisdiction is matter which is certainly contention, and if it is contention I am going to exclude it.

Mr. Maguire: Of course your Honor knows it is the defendant's position that this whole conference was pitched in exactly that way.

The Court: Well, I'm not going to rule that way in the present situation. I'm going to follow the same rule if I do it; but I'm going to say now I am not going to allow evidence to go in which constitutes an argument.

[538] Mr. Maguire: Well, if your Honor please, that I think is exactly the point you are deciding here as to whether or not—

The Court: No, I am not deciding—

Mr. Maguire: —whether this is competent.

The Court: —deciding whether or not this comes within the purview of the ruling I have made, and that doesn't mean, as I told you, that each question is going to be allowed. I am going to allow it if it is within the orbit of my ruling, this testimony on a part of the others, and if I find it is so here. It seems to be enough now for the Court to rule on the testimony.

Mr. Maguire: If your Honor please, may I be heard on that point?

The Court: I am going to permit you later, I am going into this later. I am not interested in what Mr. Garrity said is the law or anything else. So I'll have that—you can ask any questions you want in examination, and come up here and I'll save your rights. The Government hasn't any, and I'll exclude them. I'm going to admit this now for a certain purpose. It is being offered on the theory of admissions, that is one of the theories, as I understand it, and I'm making—I have already made a ruling on it, it has been made a part of the record for the Court, and I'm hearing this because you wanted a voir dire examination. I am not going to go to work and listen or admit anything of that nature. That will be clearly reversible error.

[539] Mr. Maguire: Well, if your Honor please, please note that I have objected to your ruling.

The Court: I will give you the right, you see, I am going to give you the right to ask it at a later time if Mr. Isber testifies, if I admit this testimony; but I am not going to go to work, and I think, Mr. Koen, I have indicated what my ruling will be, and what he may have said about those cases, his interpretation of what I may say about it, is certainly not germane to the issue.

Mr. Koen: Very well, sir. So there will be no question about it, if I may I withdraw the question.

Q. Was there any discussion, Mr. Isber, using this memo

to refresh your recollection,—was there any discussion about the purchase of insurance or annuity policies? A. There was.

Q. Using the memorandum to refresh your recollection, did Mr. Garrity make any reference to insurance policies or annuities? A. He did.

Q. The purchase of annuities? A. He did.

Q. Tell us, if you will, what was said about that. A. He stated that the single premium payments for insurance annuities in 1945 and 1946 show that Mr. Massei had accumulated money prior to 1945, and then he detailed payments of $27,700 in [540] August, 1945, $26,200 in August, 1946, and $30,000 in 1950, for annuity policies; and he said that he could not have gotten this kind of money in view of his small salary as a policeman while on the Personnel Squad.

Q. Was there some further discussion about that, all those transactions? A. There was.

Q. Using that to refresh your recollection, tell us what the discussion was. A. Mr. Garrity was asked why the taxpayer paid these large sums of money for insurance, and he answered that a smart insurance salesman persuaded the taxpayer and others in the gambling racket, that this was a good way to hide cash as nobody but himself would know about the payments, not even the employees of the insurance company, and that if you had cash at home you lose it if you have a fire or robbery and nobody could—and in this way, by having it in insurance, nobody can discover if you have possession of a large amount of cash.

Q. Now, using that memorandum to refresh your recollection, was there some discussion about the death of the father of the defendant Massei? A. Mr. Garrity told me that—mentioned the death of his father, who had saved a lot of cash, and that the father had been—had a partnership in a tavern which made some—which made illegal sales of

liquor, and that that was—and that some of this money [541] in 1949 came to Mr. Massei.

Q. Do you have any memory, sir, using the memorandum to refresh your recollection if you will, as to the amount of money that was received by Massei from the father's estate following his death in February, 1949? A. No, I don't know how much money he received from his father.

Q. Do you remember what expression, if any, was used to describe the amount of money? A. I think we used an algebraic expression, "X."

Q. When you say "we", who used that expression? A. I don't recollect, sir. It may be my mathematical turn of mind, or he may have, but I wouldn't want to say. I don't recall.

Q. All right, sir. Now, following that statement was there some discussion as to the status of the probate Court records? A. There was by Mr. Hurst, the Special Agent, who was present and said there was no inventory filed for the father.

Q. And in reply to that was any statement made by Mr. Garrity at that time? A. Well, Mr. Garrity said that the executor of Massei's father told him that he, Mr. Massei's father, had money, and that the younger brother, Mr. Massei's younger brother, was not very close to his father.

Q. Now, at or near the conclusion of the conference—

[A pause.]

The Court: Go ahead.

[542] Mr. Koen: No, I can't, your Honor. There is somebody else in the court room. [Short pause.] All right, sir.

Q. At the conclusion of the conference was there some discussion as to the source of the income, Mr. Isber? I am referring to the last paragraph of that memorandum. A. There was.

Q. What was said? A. Mr. Garrity stated that the

source of the income is gifts, or graft, or bribes, which he obtained, which Mr. Marzei obtained before 1945, and that the taxpayer should not be prosecuted for tax frauds just because the taxpayer was a dishonest cop, and it was not the business or the province of the Treasury to police the morals of the taxpayer.

Q. Mr. Isaac, when you were discussing the matter of the estate of this taxpayer's father,—do you have a memory of that portion of the discussion? A. Yes.

Q. During that portion of the discussion at the conference, was it stated—

Mr. Koen: Strike it out.

Q. I think you have stated that no exact amount was recited. Is that correct? A. I don't—to be honest about it, I don't recall. My notation indicates X dollars. If you want me to explain the possibilities—but I don't recall.

[543] Q. I don't want the possibilities. A. I wouldn't want to say one way or the other.

Q. Is it fair to say from the recitation of X dollars that either no exact amount was stated— A. Yes.

Q. —or that if there was one, you have forgotten it? A. That's a possibility. That's right.

Q. Those are the possibilities? A. That is what I would have—yes.

Q. Now, with reference to the discussion that you had on that aspect of the conference, at what stage of the conference was this discussion held? A. About the amount—

Q. Yes. A. Towards the very end. Towards the very end of the conference, according to the memorandum.

Q. And what generally was the subject under discussion at that time? A. Well, the question was whether the father did leave much money,—because Mr. Hurst pointed out that his brother said he didn't have over—he got nothing except $600 from his father—that the brother did. The inference—I won't give you the inference.

Q. What phase of the taxpayer's status was then under discussion? Was it the increase in net worth? [544] A. The source of funds; the explanation of the increase in net worth, yes, that's right. The source of funds and the increase of net worth, and the explanation for it.

Q. Do you mean to say then, sir, that in connection with the increase in net worth when it was then under discussion at this conference, that monies from the estate of the taxpayer's father contributed materially to the increase in net worth?

Mr. Maguire: If your Honor please,—

The Court: No, I'm not—

A. No, I couldn't answer that.

The Court: No, that's not what I want. The witness has already said that he told him the father ran a tavern and the father had some money and he participated in that estate. Isn't that it?

The Witness: That is substantially right. That is substantially right.

Mr. Koen: All right.

Cross Examination by Mr. Maguire.

X-Q. May I see this memorandum, Mr. Isber? A. It isn't mine, but you are perfectly welcome to it.

Mr. Maguire: If your Honor please, I wonder if we might take a recess at this time so that I may examine this memorandum?

The Court: The only difficulty is that this is apparently a part of confidential file of the Department, isn't it? [545] Mr. Maguire: Well, perhaps Mr. Koen can take it out.

The Court: And you know what the rule is on that.

Mr. Maguire: All I want, if your Honor please, is this memorandum which he used to refresh his memory. As to the rest of it, I suggest it be returned to Mr. Koen.

The Witness: There is one part in there, there's one little phrase there where I find I was in erro., and I think—I don't know whether it's my business to call it to the attention of counsel but—on the third page.

X-Q. I wonder if perhaps we couldn't get to that, Mr. Isber?

Mr. Koen: Well, let me ask you—if I may, your Honor?

Mr. Maguire: I object.

The Court: No, no, I'll take it. I want to get along with this. What is it, Mr. Isber?

The Witness: I used the word, my memory is, and Mr. Hurst called it to my attention—

X-Q. Who called it, please, to your attention? A. Mr. Hurst, who was present at the conference. Mr. Garrity—[A pause.] Oh, yes. Mr. Garrity stated had no criminal intent, that he cooperated with the Government, and he put up $83,000 for payment of taxes due, and that the evidence may be consistent with guilt.

Now, I don't think—I think that's an error. It is probably my error, because I don't think Mr. Garrity gave any—should be accused—should be even—there should be no inference that [546] Mr. Garrity admitted any guilt on the part of his client; in fact, he strenuously protested his innocence.

The Court: I am going to exclude anything that constitutes an argument or a contention, so I'll exclude it anyway. Under proper instructions, of course if I admit this, Mr. Maguire, it would go to the jury on the same ruling, and I am going to keep out of this all that appears to be— Don't misunderstand me.

Mr. Maguire: May that be marked for identification?

The Court: Wait a minute, please. I object. Wait a minute, please.

Mr. Maguire: I'm asking that the—

The Court: He only asked it be marked for identification.

Mr. Koen: I don't care, sir. I object.

The Court: Oh, no, listen. There is no objection to anything that is marked for identification. That's my prerogative. It rest with me.

Mr. Koen: I don't want to be placed in the position, sir, that it is offered for identification and foreclose my rights if it is later introduced in evidence.

The Court: No, by identification—

Mr. Koen: That's the purpose of my rising.

The Court: No, all identification means is that it is marked for identification and it is in no way evidence. If it [547] was offered, I would exclude it. I don't know what its purpose is. You have my assurance. That is all identification means.

Mr. Koen: I merely rose to state—

The Court: That's right. When I say identification, that's all it means. I think it is the right of counsel in any case, no matter how puerile or silly it might be, to have it marked for identification. I usually do that as a matter of judicial discipline.

[Said document marked Defendant's Exhibit G for identification.]

The Court: I don't want to have the impression created in this record that I am in any way negativing the professional right of counsel to assert the position of the client. I don't mean to say, when I exclude it, I'm doing that in the least. That's part of the functions and duties of a lawyer to go before someone and do that, and he has the right to do it, and whatever he asserts is in the way of a contention.

Now do you want to take a recess?

Mr. Maguire: Please, I think we would like it.

The Court: All right.

[Morning recess.]

[548] The Court: Let me ask you this: How long are you going to be?

Mr. Maguire: I would say, your Honor please, in terms of the jury, if they came in at say two o'clock.

The Court: I would rather not do that. I feel some of this testimony that Mr. Isber has given comes within the orbit of my ruling and I have to rule on these categorically as we go along and you have a right to insist on that, but the sum of it is, and I don't know how the questions can alter it. I don't want to prejudge or foreclose your rights to show that they do not come within the orbit of what my ruling is. The way it strikes me now, there has been enough here to rule that there were statements made, and the weight of which will be for the jury, under proper instructions by myself.

Mr. Maguire: I am sure your Honor is going to reserve judgment, at least until we finish cross-examination.

The Court: Well, I am only interested in matters that come within the orbit of my—unless you are going to show Mr. Isber's memorandum is entirely and absolutely a creation of his own imagination and that it is fictitious.

Mr. Maguire: If your Honor please, what I do want to get across, and I hope to bring out from this witness, is the atmosphere in which this conference was conducted.

The Court: I think that is a matter for cross examination. I intend to give you full opportunity to cross-examine [549] this witness, Mr. Maguire. I intend to give your client his full day in court. Don't misunderstand me. But those are matters which are matters for cross-examination. Of course I will have to limit the cross-examination, too.

Mr. Maguire: I am sure we will stay within the bounds, your Honor.

The Court: —in your professional judgment, and if I don't think it is right, I will exclude it and you have your

rights preserved, and the government has no rights, which I think should have been changed long ago. It makes it easier for a judge. That is why a judge has to do a lot of soul searching in criminal cases.

X-Q. Now, Mr. Isber, you were assistant—

The Court: You know, I mean by that, a trial judge.

X-Q. You were Assistant District Counsel in Massachusetts? A. Yes, sir.

X-Q. Was there then a director of internal revenue? A. At some point they changed a lot of names and at what point I can't remember.

X-Q. In the ordinary case where the Intelligence agents recommended criminal prosecution, that file would come into the District Counsel's office, that is your office? A. That is correct.

X-Q. And then, assuming that you concurred with the Intelligence Agent's recommendation, the file would then go directly to the [550] Department of Justice? A. Yes.

X-Q. There was no further step, in other words? A. One exception, whether it would apply here I don't recall, but as a general statement what you said is correct.

The Court: You mean back in 1952 if you made a decision, wouldn't it go to New York?

The Witness: There was an exception in the case of files marked "R"—that is "Rackets"—but with that exception they all went to the Department of Justice.

X-Q. And this case went where, after it left your office?

Mr. Koen: I pray your Honor's judgment.

A. I don't recall.

The Court: He said it went right to the Department—

The Witness: I think it went to the Department of Justice. I would want to refresh my memory. I would rather not say; it would be pure guesswork.

X-Q. When Mr. Garrity asked for a conference, you were

the first lawyer that he talked to in connection with this particular case?

Mr. Koen: I object. If he knows.

Mr. Maguire: First lawyer representing the government.

Mr. Koen: If he knows.

A. I wouldn't know whether I was the first.

X-Q. Let's put it this way: The Intelligence Agents are the [551] investigatory branch of the Department of Internal Revenue? A. Right.

X-Q. And they compile the evidence and they submit that to you with their recommendation? A. Right.

X-Q. And then you go over that evidence and you, as a lawyer, pass on its legal sufficiency? A. Yes.

X-Q. Is that a fair statement of your function? A. Yes, it is.

X-Q. And that was your function in this particular case, the Massei case? A. Correct.

X-Q. So that when Mr. Garrity came into your office for this conference, whatever he had to state was directed toward trying to persuade or satisfy you that the government evidence was not legally sufficient—

Mr. Koen: Object.

X-Q. [Continued] —to warrant prosecution?

Mr. Koen: Object. The question calls for a conclusion which could only be in the mind of the representative of the taxpayer.

The Court: Well, I am having a preliminary hearing on this.

X-Q. Would you like the question read? [552] A. No, it doesn't have to be read. Surely, Mr. Garrity came there for the purpose of trying to convince me that no prosecution should be recommended. That is the purpose.

X-Q. Yes, that the evidence— A. That the evidence didn't warrant——

X-Q. Was not legally sufficient? A. Something like—well, I wouldn't—no magic about that language. That according to the evidence, that the government had no case, put it that way, as he saw it.

X-Q. In this particular case, Mr. Isber, do you have any memory that you ever saw a power of attorney running from the defendant to Mr. Garrity? A. I have no memory as to that.

X-Q. Now, at this conference, the file, or all of the evidence in the case, had been forwarded to your office with the recommendation that prosecution be instituted?

Mr. Koen: I pray your Honor's judgment. I think this cross-examination is certainly beyond the very purpose for which this voir dire hearing is concerned.

The Court: I think I will exclude that, Mr. Maguire. What he may have done with reference to it is a matter of procedural judgment exercised by him.

Mr. Maguire: I grant you, your Honor, but it has a very important bearing on the question of the conference and you have to know the purpose of the conference in order to understand—

[553] The Court: I have to settle the preliminary question and what I am going to do, out of deference to what I consider the right of this defendant, is to leave to the jury whether or not what he said came within the orbit of my ruling.

Mr. Maguire: I take it your Honor hasn't definitely made up his mind on that point as yet.

The Court: I feel that there is enough now for the Court to rule that there were things said upon which the Court would predicate the basis that it was a matter for consideration by the jury, under proper instruction.

Mr. Maguire: Are you making that ruling at this time, your Honor?

The Court: Well, I indicated some time ago that I

thought it was enough but I don't know how this last answer would affect that. You are asking what he did, if he sent it along with the recommendation to the Department of Justice, and I should imagine, Mr. Maguire, if I were sitting as the United States Attorney I would be happy to have that go in because I think it is very adverse to your client's interest but I think if a court sat here and allowed it to go in, the court patently might well come within the purview of those cases which say I can't sit back and allow evidence to go in that is not proper evidence. I think that is an exercise of discretion on the part of an official of the United States Government, who was probably traveling along, executing a step which is a step in the [554] process by which the government determines whether or not a case should go to the proper source for final judgment and the proper source for final judgment is the Justice Department. They can't prosecute. It is the Department of Justice that finally exercises the right and as you well know they come to the United States Attorney, not orally but they come through written reports that are carbon copies of what the Treasury have, or probably originals. They then leave it to the United States Attorney to determine. Apparently Mr. Isber said there was a classification of cases that didn't go any place but went right to the United States Attorney and he said those were the cases that were marked "R". He said an "R" meant racket cases.

Mr. Maguire: If your Honor please, may I state in about two sentences the defendant's position as regards the statements allegedly made by Mr. Garrity at this conference? The government is offering them—

Mr. Koen: Wait a minute. I object to any statements by counsel. I think they ought to be taken through a witness on the stand, sir.

The Court: I will allow him to state his position, whatever it is.

Mr. Maguire: Thank you, your Honor. The government is offering the statements as admissions made by the defendant's agent. It is the position of the defendant that these statements [555] were made for such a purpose, that in effect they were nothing more than legal arguments advanced by the taxpayer's lawyer. That, if your Honor please, is the question on which you are going to pass, as to whether or not the evidence will be submitted to the jury, and for that reason I want to make clear for the record exactly what Mr. Isber's position is in the matter so that you can better understand—

The Court: I understand what his position is thoroughly.

Mr. Maguire: I am not sure the record has it all, if your Honor please.

The Court: I think it does. He went into it very thoroughly. I granted this voir dire examination, Mr. Maguire, at your request. I thought I should give it the same consideration as I have in connection with the other matters that were heard all day yesterday, and my obligation was to find out whether or not there was anything in the alleged statement, in the statement that was made, which constituted a basis for admissions which, if found by the jury to be true, were binding upon this defendant, the weight of it being for the jury, and I have already indicated now, without categorically passing on each part of it, that there is. I am going to rule on the parts as they come along that I have indicated on the main purposes, and we will cross that bridge when we get to it, that I am disposed to treat them as such and it is obvious we have held this here so that no one could publish anything in the newspapers which could cause [556] prejudice to this defendant. That is why it is being done. That is my sole reason for having it here, to protect the rights of your client, so that the

matters will not be made public, and parenthetically, Mr. Penney, I would like to say to you and I would like to say to counsel for the defendant, and I know the government will have in mind what I say, that the transcript of what took place at the voir dire examination yesterday—hearing, rather,—and the transcript of what has taken place this morning, while necessarily being made a part of the record, is to be shown to nobody. The first thing that the newspapermen will want is a copy of that. I wish you would make certain, Mr. Penney, that that does not come within the orbit of any statute which gives them the right, and I will order those parts impounded.

The United States Attorney is to have his and it is to be shown to no one; you have yours and it is to be shown to no one; I have mine and it is to be shown to nobody. I think that is the right thing to do. No notes are to be read, and I wish you would tell Mr. Martin.

Mr. Koen: I have shown my copy to no one but Mr. Di Mento and myself.

The Court: Oh, no. I mean your office force—I don't exclude any government official, of course. Anything you need to take up in the preparation of your case, you have a right to, and Mr. Maguire has that same right. My idea was to [557] stop the press from getting any part of it so that they will have no line. I think it is better not to have it. I think counsel will agree with me I am right.

Mr. Maguire: Yes, sir.

The Court: Don't you, Mr. Koen and Mr. Di Mento?

Mr. Koen: Oh, yes, I do.

X-Q. Mr. Isber, you have testified there was no stenographer present? A. There wasn't.

X-Q. And present at the conference was yourself, Mr. Hurst and Mr. Garrity? A. Correct.

X-Q. And the three parties to the conference just sat around your desk? A. Right.

X-Q. And Mr. Garrity, when he spoke, he spoke extemporaneously? That is, he read from no— A. He read from nothing. Extemporaneously.

X-Q. Is it fair to say that during the conference that he cited cases to you?

Mr. Koen: Object. Object.

The Court: No. I am going to tell you frankly that anything that is in the nature of a contention I am going to exclude. I will exclude the government and I am going to admit those things.

[558] Mr. Koen: I withdrew that question at the suggestion of the Court on the objection of counsel, and now he wants to go into it.

Mr. Maguire: If your Honor please—

The Court: I will pass upon it at the trial.

Mr. Maguire: If your Honor please, in terms of this preliminary examination, if you find as a fact that these statements made by Mr. Garrity were contentions—

The Court: I haven't found all of them. I said I was ruling on some of them. I said there was a basis upon which to admit parts of this, within the orbit of my ruling, and that I would face each part of it as we went along. That is what I said yesterday.

Mr. Maguire: It is the defendant's position, if your Honor please, everything that was stated at this conference by Mr. Garrity, back and forth, was an argument as between two lawyers.

The Court: That is not the way—you can argue that to a jury.

Mr. Maguire: If your Honor please, I would like to, if I may, in this preliminary examination, to bring out from Mr. Isber—

The Court: I want to get along with this because I want to get down to the meat of this case. I will let you ask one question and that's all.

[559] X-Q. Is it a fact, Mr. Isber, that Mr. Garrity, during the course of your conference, cited cases to you that he thought were pertinent?

Mr. Koen: Object.

The Court: Well, I will receive it. Did he, yes or no, and that is all.

The Witness: Yes.

Mr. Koen: Wait—

The Witness: Excuse me; I beg your pardon.

The Court: I have allowed it.

The Witness: All right.

The Court: This is a piece of testimony. I have allowed it and it is going to stop there. I know what you have in mind. You are the prosecutive agency of the Department of Justice.

Mr. Koen: That isn't what I have in mind at all.

The Court: What?

Mr. Koen: I have in mind several things, and I have this in mind, that this cross-examination is being used to lay the foundation for further cross-examination of the witness in the event your Honor rules this is admissible, and having admitted the question here in the voir dire, you are going to be faced with the proposition in the event—

The Court: No, I have indicated very clearly any questions asked here in the voir dire are not binding upon this [560] Court. That is why I have it in the absence of the jury, and these questions, when they are presented, they will be presented de novo.

Mr. Koen: Fine. Thank you, sir.

The Court: That is the way it is going to be. I am not going to permit any inquiry in connection with the hearing before me.

X-Q. Mr. Isber, during this conference you took notes, as I understand? A. Probably, yes.

X-Q. Do you have any recollection as to how voluminous, or not, they were? A. No recollection.

X-Q. None at all? A. I can't remember.

X-Q. But you do know from having seen this memorandum that the next day you dictated to your secretary what we now have marked for identification? A. Yes.

The Court: You say you probably did it that day after he left.

The Witness: It could have been that day after he left and the date, she may have typed it off the next day. I generally dictate as soon as the thing is over.

X-Q. Now, Mr. Isber, in connection with such conferences I think [561] you stated that occasionally the defendant himself would appear? A. There have been instances where the defendant appeared with counsel.

X-Q. And at this particular conference, of course, the defendant was not present? A. No.

X-Q. You also stated that you are aware of the Treasury regulations governing the conduct of such conferences?

Mr. Koen: I pray your Honor's judgment. That question was not asked.

X-Q. Well, are you aware, Mr. Isber? A. What is your question?

X-Q. Of the regulations which govern the conduct of such conferences. A. Yes, I was aware of the regulation. I am cognizant of the rules and regulations, and the rules of the game.

X-Q. I want to call to your attention, and this is the same regulation, if your Honor please, that excerpts were read into the record from yesterday, one particular section, Mr. Isber, and I wonder if you will be good enough to read it aloud and tell me whether or not at the time of this conference you were familiar with that provision. Incidentally, this regulation, Mr. Isber, was in effect back in 1951. Would you read the heading, please?

Mr. Koen: And I am going to object. If it was in [562] effect in 1951, this conference was in 1952.

Mr. Maguire: I beg your pardon. It was in effect in 1952.

Mr. Koen: Well, is that a fact or—

Mr. Maguire: That is a fact, Mr. Koen.

Mr. Koen: May I see the regulation?

Mr. Maguire: You read it yesterday.

Mr. Koen: May I see the one you referred to?

Mr. Maguire: Certainly.

The Court: Why don't you let me see it and then I can settle it.

Mr. Koen: Show it to the Court; all right.

[Mr. Maguire hands a document to the Court.]

The Court (examining): I will read the section in.

"No reduction in taxes proposed nor increases in allowance of claims shall be made unless the evidence upon which such action is taken is submitted in writing and in verified form. All evidence except that of a supplementary or incidental character shall be submitted over the sworn signature of the taxpayer."

That isn't the situation here.

Mr. Maguire: Is the Court making a ruling on that, if your Honor please?

The Court: No, I am trying to pass on this and I want to get on with this trial. I am disposed, Mr. Maguire, as I see [563] the situation, to allow certain parts of this testimony in and I know that Mr. Koen will try to keep within the confines of that. Statements made by this man with regard to the sources—by Mr. Garrity, with regard to the sources of income, where he got his money in 1930, whatever the date was, up to 1949 or 1950, through the various steps. I will permit the witness to testify to that.

X-Q. Mr. Isber, at any time during this conference with

Mr. Garrity did Mr. Garrity quote the defendant? A. He didn't quote him.

X-Q. He made certain statements to you concerning the defendant's activities? A. He made statements to me concerning the defendant's activities, yes.

The Court: You quoted him, didn't you, in that statement?

The Witness: That is all the question asked for. I am not going beyond the form of the question.

Mr. Maguire: Well, if your Honor please—

X-Q. Let's get clear, Mr. Isber, did Mr. Garrity ever quote the defendant? A. He didn't—

Mr. Koen: Wait a minute, please. I object.

The Court: I will exclude it.

Mr. Maguire: If your Honor please, I am frank that I [564] don't understand how I am going to get at the fact at issue.

The Court: The Witness testified his client told him that he got his money in various ways. I am not going to shape up on the testimony, how it goes in or anything else. I have just made my ruling and I want to get along with this trial and don't want to waste any more time on it.

Mr. Maguire: If your Honor please, in view of the fact that you have apparently already made up your mind on the matter—

The Court: I have indicated to you what I had to do and searched my soul and weighed this question and I indicated what I would have preferred to have done. I have to make a decision and I have made it.

Mr. Maguire: In view of your ruling, your Honor, there is obviously no point in continuing with further—

The Court: What you are trying to get this witness to do is that which might well be proper for you to ask in cross-examination. I am not saying that it isn't, Mr. Maguire. I will rule on those things—I will give you wide

cross-examination. You have a right to cross-examine to test a person's memory or a right to cross-examine to show bias and the right to cross-examine to show faulty memory and the right to cross-examine to show that a witness made a mistake, and that is the orbit which comes within the purview of the Court's discretion in many ways and I am certainly not going to deprive you of your right, but I am not trying it out here.

[565] Mr. Maguire: I want to say it is the defendant's position at this examination that he wanted to bring out evidence, bring into the record the circumstances surrounding this conference which, the defendant believes, would clearly indicate to the Court that these were not admissions made by the defendant's agents, but rather contentions or arguments made by counsel.

The Court: I am going to permit you to do that in cross examination and leave it. If I find it is inescapably clear that they were contentions or arguments, I will exclude it; if I find they are not,—then I am not going to say they are,—I am going to leave it for the jury to say whether they are, as a modicum of evidence. I want the record to show that I am not foreclosing you on your right to full cross examination.

Bring the jury down.

I would like to have you start where we left off, Mr. Koen. I would like to have you go on with the agent that was on the witness stand in the first place.

Mr. Koen: Mr. Ierardi?

The Court: Was it?

Mr. Koen: Mr. Hurst?

The Court: Yes.

Mr. Koen: Mr. Ierardi was on the stand when we first recessed.

The Court: Well, all right, I'll go ahead with [566] Mr. Ierardi.

[The jury returns to the court room at 12:36, and the court room is opened to the public.]

The Court [to jury]: I would like to refer to a statement I made this morning. I think you are entitled to know what I said, because there are certain things that we can't escape in this world, one of which is death. I had a very, very dear friend. He was a wonderful lawyer. About a quarter past seven this morning my telephone rang and I received word that he died suddenly, and I came in here this morning with a very, very heavy heart. Because, after all, I think if you travel along the pathway and you have the activity that I have had during three score and ten years and in retrospect to travel over those years, you try to measure the setbacks and the worthwhile values of life, the heartaches, trials and tribulations, and the responsibilities that fall on all of us, with our inescapable weaknesses and with the knowledge that we come into this world with free will and with a realization that we like to live and let live. And when I retrace my footsteps and think of the wonderful men that have made wonderful contributions toward the growth and development of our civilization—whenever any person like that is taken to his just reward, I always say a word. I said it this morning.

I have very, very, very dear friendships. Those friendships know no political lines, they know no religious lines, they [567] know no racial lines. All my life I have fought for that. My family settled in Somerville, oh, pretty near a hundred years ago. I had a wonderful mother that I know is in heaven, and I had a fine father. Both born in Boston. Their forebears came just like your forebears from other countries. Their parents came from Ireland, just like the Jewish immigrants came from various sections of Europe; just like the Italian with his priceless tradition, associated with the Dark Ages and associated with the great pages of history; just like all the other wonderful men who came

here; just like the Pilgrims and Puritans who came here.

So I spoke about the death of Walter Morris, and I said that he was a man who had a very distinguished background. I said that he was one of the finest lawyers in the general practice of law in Massachusetts. There are some lawyers that are especially qualified to try certain cases and handle certain cases; but I think he was recognized as one of the five or six. We didn't agree upon everything. We disagreed in matters that affected our political association. We agreed on the fundamentals of what was required. I talked to him only last Sunday.

He was a graduate of Boston College and Harvard Law School. He was one of the pioneer professors when a great law school was organized in Boston—Boston College Law School. He was a man who had the respect of everyone who knew him. He was really a man of God. Because, after all, men that travel over [568] this pathway have to live and die within the shadows of their own virtues and their own faults because they are not perfect.

I'm just telling you what I said this morning. I think he was a man who had the respect of every judge, of every court of competent jurisdiction in Massachusetts. His life is a living sermon in itself, and his life was symbolic in the lives of many, many men I know and many lovely women. You know the example of the kind of life that Mr. Morris had, Walter Morris had, is a living sermon in itself. Because, apart from what you learn in the church or synagogue, apart from what fine boys and girls learn at the footstool of their wonderful mothers, who never do anything but one thing that's unkind—that's when they die. I have always said that when a person dies, history should ask the following questions about him,—and I said the substance of this this morning. They should ask the question, Was the person courageous? Did he take his stand on matters of importance? Did he take that stand

in keeping with the kind of a philosophy that has given us a worthwhile civilization? Was he tolerant towards his fellow human beings, or her fellow human beings? Was he free from prejudice and bias? Was he or she meek and humble? And if history answers those questions in the affirmative, then you have a person whose life is part of a golden treasury, of the kind of a civilization that we all want to have.

I think that whenever that happens, it is always a nice [569] thing to speak out. Because I think that the good things a man does, the example that he sets, the community life that he represents, are the yardsticks that go to make up the things that are worthwhile for me. And while I have been here this morning, I really had a heavy heart through the death of a very dear friend, known to many here. I often think of the poem of Longfellow, The Psalm of Life. It's so nice to think of the good things that a man stands for. I never heard Walter Morris say an unkind word about anyone in my long friendship with him. That's the greatest compliment I can say to a person. Sometimes I wish I could say it about myself. I can say it about him.

I thought you ought to know what I said.

Well, we have to carry on; so, Mr. United States Attorney, you may go forward.

Mr. Koen: Mr. Ierardi:

DOMINIC A. IERARDI, Resumed.

Direct Examination by Mr. Koen, Continued.

Mr. Koen: I guess, in view of the time that has elapsed, it might be well to start over again, sir.

Q. Your name, sir? A. Dominic A. Ierardi.

Q. And where do you live? A. 96 Anawam Avenue, West Roxbury.

Q. By whom are you employed? A. The office of the

District Director of Internal Revenue, Intelligence Division, Boston.

[570] Q. How long have you been connected with the Internal Revenue Service? A. 21-½ years.

Q. And what is your present position, sir? A. Group Supervisor.

Q. And what was your position in 1951, in the latter part of the year? A. The same.

Q. Directing your attention to the 8th of November, 1921, did you have a conversation with one W. Arthur Garrity, sir? A. Yes.

Q. And that conversation, sir, where was it? A. In my office at 40 Central Street, Boston.

Q. You knew Mr. Garrity? A. Yes, sir.

Q. Tell us, if you will, what the conversation was that was had with Mr. Garrity on that day.

Mr. Maguire: If your Honor please, I am very pleased to have him state what the result was, if that is what they're getting at, but certain conversation that was had here I don't think is admissible.

The Court: I think it was at this point that we—

Mr. Koen: The voir dire took place.

The Court: —that we excused the jury and I went into that which was the proper thing to do, but which I must [571] advise you cannot be considered as a circumstance either against the Sovereignty of the United States, or for the United States, or against the defendant or for him. It was the proper thing to do. The responsibility was mine because I think I had to settle some very important questions in a soul searching effort to arrive at what I consider to be the yardstick. All this evidence that is going in, I am going to instruct you on later, on the yardstick that you are to use to judge it.

Now, would you come up a minute. I am frank to say that I have forgotten this.

[Conference at the bench, during which the following was recorded:—

The Court: What is he going to say?

Mr. Koen: This witness is going to say—

The Court: Did he say it at the time?

Mr. Koen: No, I believe there was objection at that time, and that's why we took the voir dire.

The Court: Does this deal with the $85,000?

Mr. Koen: No, not at this stage. At this stage this witness will testify, if I remember exactly, that Mr. Garrity said to him, "I received a call from a person at Worcester—"

The Court: From who?

Mr. Koen: "—from a person in Worcester about"—He was never identified. "—about a tax matter. The taxpayer's name is Massei. I [572] expect to have a conference with him tomorrow morning in my office, after which powers of attorney will be executed."

The Court: I think I will admit it.

Mr. Maguire: Note my objection.

Mr. Koen: Then, subsequently, I think it was about a week later, arrangements were made between Ierardi and Garrity for the—

The Court: That is, as the result of something they met?

Mr. Koen: Yes, as the result of a conference.

The Court: I wouldn't let the conference in.

Mr. Koen: No, sir. I understand. I don't intend to ask it, sir.

The Court: I will permit this on the basis of—I'm not going to limit my reasons. I permit it.]

Q. Tell us, if you will, please, Mr. Ierardi, the conversation that you had with Mr. Garrity on that day.

Mr. Maguire: My objection is noted, your Honor?

The Court: That is right. Oh, indeed, yes.

A. Mr. Garrity said that he had received a call from a person in Worcester, that he had expected to get a power of attorney the next day following a conference which he had scheduled at [573] 10 o'clock that next morning. He said that he wanted to cooperate 100 per cent with the Government, and that he wanted to avoid publicity such as was given in a recent—

The Court: No, I'm going to exclude that part.

Mr. Koen: All right.

The Court: The jury may disregard it.

A. [Continued] I told Mr. Garrity that I would like to have him bring in his client, and that if his client cooperated it might change the course of action which we had contemplated. He then said that it was Bill Massei, formerly connected with the Worcester Police Department; that Mr. Massei had received a letter, dated November 7, 1941, from Special Agent Harold Hurst, to the effect that—

The Court: No, no. He received a letter. That's all.

A. [Continued] I told Mr. Garrity that he could bring in Mr. Massei and talk to Mr. Pastore, Mr. Hurst, or to me. I told him that the course of action that I had referred to was in connection with a jeopardy assessment.

The Court: No, I'm not going into that, either. I am going to exclude it.

Mr. Koen: All right.

The Court: The question that was stated by you, Mr. Koen, with reference to what he was going to take, what he was going to get—that is what I have admitted. That's all.

Mr. Koen: That, sir, was at a later date. This is [574] still the conversation on the 8th.

Q. Is that right, Mr. Ierardi? A. That is right.

Mr. Koen: However, if your Honor feels as though I shouldn't press it, I won't.

Q. Did you at some time later hear from Mr. Garrity? A. Yes, sir.

Q. Was that by telephone, or did he come to the office? A. Mr. Garrity came to the office.

Q. All right. Can you help us as to the date? A. November 9, 1951.

Q. Did you have some discussion with him at that time? A. Yes, sir.

Q. And as the result of the discussion you had on November 9th, were arrangements made to meet at a later time? A. Yes, sir.

The Court: Do I understand, Mr. Koen,—I probably haven't—it's for the jury to remember. Will counsel come up, please?

[Conference at the bench, during which the following is recorded:

The Court: Do I understand that testimony has been given—I must have missed it—that he expected to get a power of attorney?

Mr. Koen: Oh, yes, that's gone in.

[575] The Court: The witness has testified?

Mr. Koen: He testified.

The Court: Oh, I missed it.

Mr. Koen: So there will be no question, will you, please, Mr. Martin, go back and read that part?

(The reporter reads the following:

"Mr. Garrity said that he had received a call from a person in Worcester, that he had expected to get a power of attorney the next day, following a conference which he had scheduled 10 o'clock that next morning.")

The Court: That's a piece of testimony I didn't hear, and as long as it has been said for the jury, it isn't for me to put any emphasis on it. The jury's

memory controls. So we'll recess here now until quarter past two.]

[Recess from 1 p.m. to 2:15 p.m.]

[576] AFTERNOON SESSION

DOMINIC A. IERARDI, Resumed

Direct Examination by Mr. Koen, Continued

Q. Mr. Ierardi, I think before we recessed at noon, we had reached the point where you stated that as a result of the conversation with Mr. Garrity you were to meet him at a later date. A. Yes, sir.

Q. The date, sir, that was set? A. The date that was set was tentatively the first part of the following week.

Q. And did there come a time during the following week that you met Mr. Garrity? A. Yes, sir.

Q. And the date, please? A. November 14, 1951.

Q. And was the confirmation of that date made to you by Mr. Garrity in person, or by telephone? A. The date was made by telephone.

Q. And can you help us, with reference to the 14th, when that telephone conversation was? A. That was on the morning of November 14th, somewheres around 10 o'clock.

Q. As a result of that conversation with him, did you go somewhere? A. Yes, sir.

[577] Q. And where did you go, sir? A. The Federal Reserve Bank of Boston on Pearl Street.

Q. And whom did you meet when you went to the Federal Reserve Bank? A. Mr. Garrity, Mr. and Mrs. Massei.

Q. And tell us, if you will, what happened.

Mr. Maguire: If your Honor please—have you finished, Mr. Koen?

Mr. Koen: I was just going back to ask him what happened at that time.

Mr. Maguire: We are now talking about November 14, 1951. The years with which this Court and jury are concerned are the years 1946 through 1950. I don't think the events in 1951 have anything to do with the matter before the jury.

The Court: Well, I am sure I don't know what it is; I haven't the slightest idea what the testimony is, and I can't pass upon it unless counsel come up and tell me what it is. But I can readily understand where, under certain circumstances, events in 1951 would be associated.

[Conference at the bench.]

The Court: Mr. Koen, will you be good enough to direct his attention—?

Mr. Koen: I don't want to be accused of leading the witness, your Honor.

Mr. Maguire: I would rather you didn't, Mr. Koen, [578] thank you. Well, my objection on the grounds of relevancy is noted?

The Court: Your rights are saved, Mr. Maguire. This is one of the matters that I considered. Go ahead.

Q. Tell us what happened, Mr. Ierardi, at the Federal Reserve Bank on that day. A. About 15 minutes after I arrived at the bank, Mr. Joseph Wall, who was then cashier in the office of the Collector of Internal Revenue, Boston, appeared. Mr. Wall talked with Mr. Garrity, and then Mr. Wall and Mrs. Massei went to the Government Teller's window, and Mrs. Massei took out of her handbag three packages wrapped in brown paper. These packages were given to the Government Teller. The packages were opened and the Government Teller counted the currency.

Mr. Wall had some slips prepared and a Form 1 receipt, which is a temporary receipt, prepared, showing the sum

of $84,500 being deposited to the 9B and D Account, which is a suspense account in the office of the Collector of Internal Revenue.

He told Mr. Garrity that he would send him an official receipt for that sum of money, and he gave him a franked envelope whereby Mr. Garrity could return the temporary receipt which he had then given him.

Q. To whom did he give the temporary receipt? A. To Mr. Garrity.

Mr. Koen: That is all.

[579] *Cross-examination by Mr. Maguire*

X-Q. Mr. Ierardi, the deposit of this money you have just described, that relates to the civil liability of the defendant? A. Yes—

Mr. Koen: Object.

The Court: I will exclude that.

Mr. Maguire: If I may make an offer of proof, your Honor.

The Court: Whenever an offer of proof is made, it is the fundamental right of counsel for the defendant to do it and it is the obligation of the Court to receive it, so please don't conclude because the offer of proof is made, it is made under circumstances where evidence is kept away from the jury. This is something I have excluded because I don't think it should be admitted, and Mr. Maguire is making an offer of proof and he is doing his duty as a fine lawyer.

[Conference at the bench:

Mr. Maguire: Mr. Ierardi's answer to the question I put would have been yes. I have a number of further questions, if your Honor please, along the same line.

The Court: There is no doubt it was civil and not criminal.

Mr. Maguire: I think the jury ought to know that.

The Court: What is the objection to it? What difference does it make? Why not let it go in?

[580] Mr. DiMento: The tax liability is as much a part of a criminal case as it is civil—

The Court: But it isn't a criminal penalty, is it?

Mr. DiMento: No.]

The Court: I will permit the question to be answered.

[The question is read.]

Mr. Koen: May we have the answer limited to what the witness knows?

The Court: That's right.

A. That payment relates to a payment in escrow against which any tax deficiency, if one was found due, would be charged against such funds.

The Court: In other words that is set aside in escrow, the correctness of which amount must be demonstrated later; is that right?

The Witness: Yes, sir.

The Court: And one of the purposes in doing it is to stop interest; isn't that right?

The Witness: That is one of the purposes. The other purpose is to protect the government's interests.

The Court: One protects the defendant and the other protects the government; is that right?

The Witness: That's right, your Honor.

Mr. Maguire: May I have a minute, your Honor?

The Court: So that the jury may have no misunderstanding [581] with regard to the character of that money, that is the money that later on came from the cashing of the annuities; is that right? There is no dispute?

Mr. Maguire: There is no dispute, as far as I know. We have testimony about the John Hancock insurance

policies cashed at the same bank a month earlier and now it is being turned in to the suspense account.

The Court: Is that the same amount?

Mr. Maguire: I believe it is, if your Honor please. [Brief pause.] That's all, Mr. Ierardi.

Mr. Koen: Wait just a minute, Mr. Ierardi. [Brief pause.] I have no further questions. Mr. Hurst. You are excused, Mr. Ierardi.

The Court: You were sworn, weren't you?

Mr. Hurst: Yes.

The Court: I think you better be resworn.

HAROLD HURST, Resworn

The Court: That is no reflection on you, Mr. Hurst. It is only because we had a voir dire hearing and—

The Witness: Perfectly all right, your Honor.

The Court: Mr. Ierardi had already been sworn and left the witness stand.

Direct Examination by Mr. Koen

Q. Your name, sir? A. Harold Hurst.

[582] Q. Where do you live? A. 15 Hay Road, Newton, Massachusetts.

Q. What, sir, is your profession? A. Certified public accountant and attorney.

Q. Will you give to the Court and jury, sir, your educational history and background? A. Graduated from Public Latin School in Boston—

Mr. Maguire: If your Honor please, I have no objection, really, but I am wondering if the jury is interested. Is this man going to be an expert witness, Mr. Koen? If he is just going to testify to this investigation—

The Court: I haven't any idea. Are you going to use

him as an expert, Mr. Koen? Is he going to testify as an expert?

Mr. Koen: No, sir.

The Court: Well, he is a member of the bar and a certified public accountant and that requires—

Mr. Koen: May we go to the bench?

The Court: Surely.

[Conference at the bench:

Mr. Koen: You asked me if I was going to have him qualify as an expert. Of course I am going to have him qualify as an expert so far as reaching this net worth is concerned. When I said no, I thought you meant so far as computation of taxes is concerned. I do think I am entitled to it for another reason. I anticipate, [583] in view of what transpired yesterday, that Mr. Maguire is going to cross-examine him and try to reflect on his credibility and I think that his history and background, educationally and professionally, is of some value.]

The Court: I will allow it. It is within the orbit of my discretion and I will allow it. It doesn't do any harm.

Mr. Koen: All right, sir.

Mr. Maguire: I hope he had some education, your Honor, after all this to-do.

The Court: You mean after Boston Latin School.

The Witness: I have an A.B.—

The Court: If I may say, parenthetically, I think I attended your graduation exercises at Boston Latin School. Did I not?

Mr. Maguire: You were there, your Honor.

Q. Following your attendance and graduation from Boston Latin School will you tell us, please, where you went? A. I received an A.B. degree from Harvard University.

The Court: Boston Latin School is a great school. You will agree with me on that? You don't mind if I say that,

Mr. Maguire? That isn't harmful to the defendant in any way. It is one of the great preparatory schools in the country.

Q. Graduated from Harvard with an A.B. what year, sir? A. 1938.

[584] Q. With or without honors? A. With honors.

Q. The nature of the honors? A. High honors.

Q. Magna cum laude? A. Yes.

Q. Following your graduation from Harvard, what did you do? A. Well, I worked for two years and then went into the Army in 1940.

Q. And how long did you remain in the Army? A. Almost five years.

Q. Following your termination from the military service did you reenter school? A. Yes.

Q. What school did you attend, sir? A. Boston University Graduate School of Business Administration.

Q. And when did you graduate? A. 1947.

Q. Did you have a major there? A. Accounting, yes.

Q. Following your graduation from Boston University what did you do, sir? A. I taught for one year in Worcester at a business college.

Q. The name of the business college? A. Becker Junior College.

[585] Q. What subject did you teach? A. Accounting.

Q. When did you become a certified public accountant? A. I think it was 1952 that I actually received the certificate.

Q. When did you earn the certificate by examination? A. 1947.

Q. Following the teaching service at Becker Junior College, what did you do, sir? A. I entered the government service as a special agent in the Treasury Department.

Q. How long did you remain in the service as a special agent? A. Until 1953.

Q. Now, sir, did you attend any other schools? A. I went to Northeastern University Law School at night.

Q. Did you graduate from there? A. Yes, I did.

Q. With what degree? A. LL. B.

Q. And are you a member of the bar? A. Yes.

Q. And you are now practicing as a certified public accountant and an attorney, I think you said? A. Yes, sir.

Mr. Maguire: May we have when he became a member of the bar?

[586] Q. When did you become a member of the bar? A. 1953.

Q. All right, sir. In the course of your official duties as a special agent of the Intelligence Division of the Treasury Department, sir, at some time did you receive certain income tax returns of one William V. Massei? A. Yes, November 7, 1951.

Q. And in connection with those returns did you do something on that date? A. Yes, I sent a registered letter to Mr. Massei notifying him of the initiation of an investigation of those tax returns.

The Court: That is the one he has already identified; isn't that right?

The Witness: Yes.

Mr. Koen: That was on the voir dire, sir.

The Court: That's right.

Q. I show you this document and its attachment, sir, and I ask you if that is a correct copy of the letter which you have just described as having been sent out by you on the 7th of November, 1953? A. Yes, it is.

Q. And the attachment; will you identify that attachment, sir? A. The attachment is a return receipt signed by William V. Massei and the date of delivery was November 8, 1951.

Q. May I have that, sir, please? [587] A. [Handing.]

Mr. Maguire: There is no objection.

Mr. Koen: May this now be introduced as government's Exhibit No. 38, previously in for identification?

[Government's Exhibit No. 38 for Identification received in evidence.]

Q. When, following the 7th of November, sir, did you start on the investigation of these income tax returns? A. November 8th.

Q. What did you do, sir, in connection with the investigation? A. I went to Worcester to look for bank accounts in the names of Mr. and/or Mrs. Massei.

Q. And what was the result of your trip to Worcester? A. I found several bank accounts.

Q. Can you tell us now what bank accounts you found on that day? A. I can't identify them exactly but I know I found several.

Q. When next did you do something in the course of your investigation of the income tax returns of William V. Massei? A. On the next day I went back to Worcester and found another bank account and found a brokerage account.

Q. Which bank account did you find on the 9th of November, Mr. Hurst? A. Worcester Federal Savings and Loan Association.

Q. And the brokerage account? [588] A. I found it at Reed and Company in Worcester.

Q. When next did you do anything in the furtherance of the investigation of the tax returns of William Massei? A. You mean an affirmative act?

Q. Yes. A. November 14 I went to Westerly, Rhode Island.

Q. Now, before you went to Westerly, Rhode Island, and specifically directing your attention to the 13th of November, did something happen in connection with the tax matters of this defendant, William Massei? A. I discussed the matter with Mr. Pastore—the case, with Mr. Pastore.

Q. Yes? What else, sir? A. Mr. Garrity had left powers of attorney—

Mr. Maguire: Is this of your own knowledge?

The Witness: Yes, it is of my own knowledge.

Q. Did you observe the powers of attorney, sir? A. I have no direct recollection of the contents of the powers of attorney. My best recollection is that they were turned over to me on that date.

Q. When powers of attorney were turned over to you, sir, would there be specific portions of them that you would examine? Yes or No.

Mr. Maguire: Your Honor please, I think we are only interested in this particular case. He has testified Mr. [589] Garrity turned over to him powers of attorney. That is the only thing I think we are concerned with.

Mr. Koen: Well, I will withdraw th question at this time, sir.

Q. Were you, Mr. Hurst, aware of the existing regulations and statutes concerning your conduct with taxpayers? A. Yes.

Q. In accordance with the existing regulations and the statutes, sir, was there a custom and a practice conducted by you and the Intelligence Agents with reference to the procedure in talking to attorneys without powers of attorney having been filed? Yes or No, please.

Mr. Maguire: Your Honor please, I think the regulations will speak for themselves. I would be very pleased to have Mr. Koen read into the record whatever regulation he thinks is pertinent, and I think it is obvious—

The Court: We agreed yesterday and they were read by Mr. Koen and read by you.

Mr. Maguire: And if he, perchance, feels—

The Court: The regulations define the course of procedure and if the witness knows what they are, why shouldn't he be allowed to answer?

Mr. Maguire: The best evidence is the regulations themselves and I would be very pleased to have them read into the record so the jury can hear them.

[590] Mr. Koen: With all due respect to the remarks of Mr. Maguire, I am now asking the Court to take judicial notice of the regulations and I would like to have my question answered by the witness.

The Court: Didn't you agree yesterday I could take judicial notice—

Mr. Maguire: As a matter of fact, I would like to have the regulations read in, your Honor. I think they speak for themselves.

The Court: Why not read them in, Mr. Koen?

Mr. Koen: I will let Mr. Maguire read them in, sir. I would like to conduct my case as I choose and not be dictated to by counsel—

Mr. Maguire: It is not a question of dictating, it is a question of doing it the right way.

Mr. Koen: I pray your Honor's judgment. I have a right to proceed until the Court tells me I am incorrect in my position, and I maintain my position.

The Court: I think the rules and regulations should be written out. I think Mr. Koen is right and I think you are right.

Mr. Koen: Everybody is right, your Honor.

The Court: If you read the regulation there will be no more objections.

Mr. Koen: I don't intend to do the research work.

[591] Q. Mr. Hurst, will you examine this and tell the Court and jury, and read into the record, the pertinent regulations pertaining to conduct of attorneys presenting powers of attorney before the Treasury Department? A. Have you got Circular No. 230 in here?

Q. Circular No. 230 is in there, yes. [Pause.] Can you help us by identifying the section number, Mr. Hurst?

[592] A. It's the Prentice-Hall Tax Service, Paragraph 21270.

Q. The circular number issued by the Department is 230? A. The governing circular is 230, yes, or it was at that time.

Q. Will you read the section that deals with the requirement of enrollment or powers of attorney? A. [Reading:]

> "No attorney or agent representing a claimant or person before any of the offices of the Bureau of Internal Revenue shall appear or be recognized in any case, matter, claim, or other proceeding or business pending in such office unless the attorney or agent representing the claimant presents and files a power of attorney, or a certified copy thereof, from his principal in proper form authorizing him to prosecute the case, claim, or matter in question. Such power of attorney shall always be filed and evidence of enrollment submitted before such attorney or agent is recognized. In the event, however, that an attorney or agent presents himself for conference who is not familiar with this requirement, or who can show that he has not had reasonable opportunity to obtain a power of attorney from his client, or who has not applied for enrollment, but is able to produce such evidence as will reasonably convince [593] the Bureau's representative that he has authority to represent the taxpayer, such attorney or agent may be heard with the understanding that a power of attorney in proper form and evidence of enrollment will be promptly forwarded to the Bureau, and that until such power of attorney and evidence of enrollment shall have been filed information will not be disclosed to such attorney or agent relative to the Bureau's attitude in respect of the issues raised or to any other matter relating to the taxpayer's case."

Q. All right. Let me have that regulation you just read. Oh, go ahead, I thought you had completed it. A. Section 21,273:

"Any power of attorney offered in evidence in any case will be accepted only if it is in regular form. Only one power of attorney shall be in effect in any case and there shall be included in such power of attorney the names and addresses of all attorneys or agents to whom the taxpayer has delegated authority to represent him.

"It is considered necessary in all cases that the power of attorney contain language to convey the principal's intention, though not necessarily in strictly legal form.

[594] "The power of attorney must be executed before a notary public, or, in lieu thereof, witnessed by two disinterested individuals. The notarial seal must be affixed unless such seal is not required under the laws of the State wherein the power of attorney is executed. No attorney or agent as notary public shall take acknowledgments, administer oaths, certify papers, or perform any official act in connection with matters pending before the Bureau in which he is employed as counsel, attorney, or agent, or in which he may be in any way interested.

"The power delegated to an attorney or agent in a power of attorney enumerating certain specific acts which may be done will be considered limited to those acts.

"Express authority to do the following acts must be granted and shown in the power of attorney or such acts will be considered beyond the scope of the agent's authority:

"1. To receive but not to endorse and collect checks in settlement of any refund. (See section 3477 of

Revised Statutes, which prohibit assignment of claims or portions thereof, and title 'checks in payment of refunds,' paragraph XXI herein.

[595] "2. To delegate authority or to substitute another agent or attorney.

"3. To execute consents agreeing to a later determination and assessment of taxes than is provided by statute of limitations.

"4. To execute closing agreements relative to the tax liability.

"The power of attorney should be signed as follows:

"*a* In the case of an individual taxpayer, by such individual.

"*b* In the case of any taxable year for which a joint return was made by a husband and wife, by both husband and wife, except that either spouse may sign for the other if duly authorized in writing so to act.

"*c* In the case of a partnership, either by all members or in the name of the partnership by one of the partners duly authorized to act.

"*d* In the case of a corporation, by an officer of the corporation having authority to bind same and be attested by the secretary of the corporation over the corporate seal."

Your Honor, shall I continue to read about corporations in here? Mr. Koen—?

[596] The Court: Do you want it read, Mr. Maguire?

Mr. Maguire: I don't think it is at all pertinent, your Honor.

The Court: I don't think there is any question. There is no corporate setup here.

Mr. Maguire: That is correct.

A. [Continued.] "F. *Certain powers of attorney to be filed in field offices.*

"Powers of attorney covering income, profits, estates, and gift tax cases, also Vinson Act cases, shall be filed in the office of the internal revenue agent in charge of which the case is under consideration,—"

The Court: Also what, did you say?

The Witness: Vinson Act cases.

Mr. Koen: Capital V-i-n-s-o-n Act.

The Court: Oh, yes.

A. [Continued.] "—accompanied by sufficient authenticated copies thereof for attachment to the return for each tax year under consideration.

"Fee statements respecting contingent or partially contingent fee agreements required to be filed by attorneys and agents and agents under provisions of paragraph (*y*), section 2, Department Circular No. 230, revised, effective October 1, 1936, as amended (see CB1937-2, page 645) [597] (31 CFR Part 10), should be signed only by the attorney or agent and filed with the Internal Revenue Agent having the case under consideration."

Q. Thank you, sir. Having in mind the statutes and regulations, sir, which covered the matter of attorneys representing taxpayers, was there among Special Agents a custom and a practice with reference to powers of attorney and representatives of taxpayers? A. Yes.

Mr. Maguire: Your Honor please, I think we can certainly agree that as far as Mr. Hurst is concerned and the agents, they would of course try to abide by those regulations that have just been read, and it doesn't seem to me we have to go into it any further than that.

Mr. Koen: Fine!

Q. Now, having that in mind, if that is conceded, was it invariably your practice to refuse to talk to one representing, or holding himself out to represent, a tax-

payer, unless and until a power of attorney was filed? A. Generally, yes.

Q. Directing your attention specifically to this case, was that one in the general category you have referred to in your answer? A. My recollection in this case, Mr. Koen, is there was a power of attorney and I never pursued the matter any further. I was satisfied there was a power filed.

Q. Fine! Directing your attention to November 14, 1951, sir, [598] did you in the course of the investigation of the tax matters of this defendant do something? A. Yes, I went to Westerly, Rhode Island.

Q. Tell us what you did at Westerly, Rhode Island, on that day. A. I had information that Mr. Massei had a house—

Mr. Maguire: No, just what you did.

The Witness: I'm sorry.

The Court: As a result of information . . .

A. As a result of information I had, I checked with the building inspector, the Town building inspector in Westerly, Rhode Island, and found that Mr. Massei—or a house permit had been taken out to built a house for Mr. Massei in April, 1948, by one Samual Urso, contractor, and I found Mr. Urso in Misquamicut, where he was building a house, and I talked with Mr. Urso. I also went to see Mr. Massei's house at 59 Shore Drive.

Q. And what did you observe about the house on that occasion, sir? A. Well, it was a nice house.

Q. Was there any—

Mr. Maguire: If your Honor please—

A. It was up for sale—if that's what you mean.

Mr. Maguire: —if he is going to describe it, let him describe it. We don't want characterizations.

The Court: Well, he had a house there, or he saw a house.

[599] Mr. Maguire: I don't think there is any question about it. We have a lot of bills and things in here about the amount of money that was spent.

The Court: We have evidence already in about that.

Mr. Maguire: No dispute about it. May that characterization "nice house" go out?

Mr. Koen: I have no objection to that if the balance of the answer may stand. Will you read the balance of the answer, Mr. Martin, so we may know the state of the evidence.

[The reporter reads the following:

"And what did you observe about the house on that occasion, sir? Answer: Well it was a nice house."]

The Court: That may go out.

Mr. Koen: Didn't he say something else after that?

[The reporter reads the following:

"It was up for sale, if that's what you mean."]

Mr. Koen: Thank you.

Q. When next did you do anything in connection with the investigation of the tax matter of Lieutenant Massei? A. November 15, 1951.

Q. And following that, sir? A. November 16, 1951.

Q. Where were you on that day? A. In my office in Boston.

[600] Q. Did somebody visit you? A. Mr. Garrity.

Q. Tell us what happened on that day, sir. A. I requested that Mr. Garrity—

Mr. Maguire: If your Honor please, if we are going to get into conversation here, I object. [To witness] I understand the defendant was not present, Mr. Hurst?

The Witness: That is correct.

The Court: Was this after your visit to Westerly or before?

The Witness: This was subsequent to my first visit

to Westerly but not—but before a subsequent visit to the bank in Westerly, your Honor.

The Court: Well, you went to Westerly. Would you ask him, Mr. Koen, when he went to Westerly the first time, whether or not he saw Mr. Garrity there?

Q. You have testified, I think, that on November 14th, 1951, you went to Westerly, Rhode Island? A. Yes, sir.

Q. Did you see Mr. Garrity at Westerly on that day? A. I did not.

Q. Did you see Mr. Massei at Westerly on that day? A. I did not.

Q. All right. Now, on November 16th, you were in your office and you met Mr. Garrity? [601] A. Yes.

Q. Now I am going to ask you a question, and give counsel a chance to object. Did you have some conversation with Mr. Garrity on that day? A. Yes.

Mr. Maguire: Just yes or no.

The Witness: Yes.

Q. What was the conversation?

The Court: Was it in connection with the matter that was under investigation? Ask him.

Q. Were you at that time discussing the tax matters involving Lieutenant Massei? A. Yes.

Mr. Koen: In view of your Honor's ruling heretofore, I am going to—

The Court: Was there a conversation that involved it?

Mr. Keon: Yes.

The Court: I will admit it.

Mr. Maguire: If your Honor please, will you note my objection?

The Court: Oh, yes, I'll be happy to do it, Mr. Maguire. I made that perfectly clear, and you have a right to it.

Mr. Maguire: Very good. I wondered, if your Honor please, if you would allow me, without going into detail, so the jury may know the reasons for my objection—

[602] The Court: No, I'm not going to have reasons given by either the United States Attorney or by yourself. If you want to give the reasons, why you can give them up here at the bench and I'll be happy to receive them. And I want to be careful to preserve both parties—preserve myself from the suggestion that I had, wittingly or unwittingly, permitted anything to go to this jury which might cause prejudice. That's my only reason.

Mr. Maguire: I appreciate that. But at the same time, if your Honor please, I think from the defendant's standpoint it is most important—

Mr. Koen: Wait a minute.

Mr. Maguire: —that the jury should know my reasons.

Mr. Koen: No, may it please the Court.

The Court: No, I will not permit that.

Mr. Koen: May the reasons be stated at the bench, your Honor?

The Court: That's right. At the bench. I'm happy to have you come up here at any time. I'll be happy to have you have anything except my judicial place. All I hope is you three fine young men will be able to grace the bench.

[Conference at the bench, during which the following was recorded:]

"Mr. Maguire: Your Honor, I have requested the right to address in open court my objections [603] to this question—

The Court: That's right.

Mr. Maguire: —relating to conversation between Mr. Garrity and Mr. Hurst. My objection is largely covered by the voir dire examination which was held yesterday.

The Court: That's right.

Mr. Maguire: I would like to state as my reasons at this time that the evidence is incompetent, it is irrelevant and immaterial; that the admissions, al-

leged admissions as such are uncorroborated. Furthermore, the admissions are outside the bill of particulars which have been filed by the Government. Now—that's all.

If your Honor please, I assume that Mr. Koen—Well, we better go along and see what happens.]

The Court: I am going to ask you, Mr. Foreman and members of the jury, please receive this testimony and try to remember it factually. I am going to instruct you on the law with reference to it, because the ultimate question of the authority of an agent—and a lawyer can be an agent under certain circumstances the same as any other person—to make admissions binding upon the defendant, binding upon a defendant, is for you. And what I consider to be—not what I consider to be—under what it is my considered judgment is a proper [604] instruction. So please, I beg of you, form no conclusion adverse to this defendant or favorable to him or adverse to the Government. Please remember, this is one of the matters I heard yesterday, and I have told counsel exactly how I was going to handle it, and that is the way it is coming. I will receive it now. Now keep your minds wide open. I'm very anxious to have you do that. It would be unfair to this defendant and it would be most unfair to the sovereignty of the United States if you did not. I know you will do that. All right, Mr. Koen.

[605] Q. What was the conversation that you had, Mr. Hurst, on the 16th of November, 1951, with Mr. Garrity? A. I asked Mr. Garrity if I could not inspect the safe deposit box which Mr. Massei; Mr. and Mrs. Massei had at the Worcester County Trust Company in Worcester, and he agreed to such an inspection.

The Court: No, no.

Q. What did he say? A. He said Yes, probably the next Tuesday. I also asked Mr. Garrity to bring Mr.

Massei in for a sworn statement. He said Yes. I also asked Mr. Garrity to bring in certain data with respect to assets and liabilities of Mr. Massei, and he agreed to do that, and said that he would go to Mr. Massei on Sunday and start compiling the information which I wanted. He also said that he wished to disclose everything.

Q. When was the next time, sir, that you did anything in connection with the tax matter involving Lieutenant Massei? A. I received more data from Mr. Garrity or some data on November 19, which he brought up to my office.

Q. Did you work on this matter the following day, Mr. Hurst? A. Yes. I went to Worcester on the following day in connection with this case.

Q. Where did you go and what did you do in connection with this tax matter of Lieutenant Massei? A. I went to the Worcester Federal Savings and Loan Association and [606] got certain photostats in connection with, I believe it was, Mrs. Massei's account. I went to the Worcester Five Cent Savings Bank and picked up some photostats. I made some photostats at the Worcester County Institutions for Savings. I made some photostats at the Worcester Mechanics Savings Bank in Worcester. I also went to the B. Reed and Company and got some brokerage records which I had requested before.

Q. In addition to those activities was there anything else done in Worcester on that day? A. Yes. I inspected Mr. and Mrs. Massei's safe deposit box at the Worcester County Trust Company.

Q. Who was present there, sir, on that day? A. Revenue Agent William O'Brien, Mrs. Massei and Mr. Garrity.

Q. And yourself? A. And myself.

Q. What was done with reference to the contents? A. We drew up an inventory of all the contents?

Q. Was there any cash in the safe deposit box, sir?

A. There was no cash, unless you call a $2.50 gold piece cash. That's all there was.

The Court: That is legal tender, a $2.50 gold piece.

Q. Directing your attention, sir, to the 23rd of November, 1951, was something done by you in connection with this tax matter of Lieutenant Massei on that date? A. Mr. Garrity came up and gave me a breakdown on interest and [607] dividends reported by Mr. and Mrs. Massei. He also brought up certain bank statements and canceled checks of the Worcester County Trust Company checking account of Mrs. Massei.

Q. Now before I go on to my next question, you have mentioned a breakdown. Have you that there, sir? A. Yes (handing papers to Mr. Koen).

Mr. Maguire: No objection, your Honor.

The Clerk: Government's Exhibit 43.

[The above described document marked Government's Exhibit 43.]

Q. From whom did you receive this, sir? A. Mr. Garrity.

Mr. Koen: May I show it to the jury?

The Court: Yes. There is no objection?

Mr. Maguire: None at all, your Honor.

[Mr. Koen hands Government's Exhibit 43 to the Foreman of the jury.]

Q. Had you previously asked for this document, sir? A. I believe so.

Q. I think you said that Mr. Garrity had some bank statements and canceled checks at that time? A. Yes.

Q. Were the canceled checks and bank statements left with you on that date? A. No.

Q. What was said about those at that time, sir, if anything? [608] A. Mr. Garrity hadn't had an opportunity to look them over himself, and he took them back that day to bring back at another time.

Q. Did you have some more conversation with Mr. Garrity on that date? A. Yes.

Q. Tell us what that was, if you will.

Mr. Maguire: If your Honor please, I don't want to keep objecting, as long as my rights—

The Court: Your rights are saved.

Mr. Maguire: I mean what I am objecting to is any conversation when the defendant was not there between Mr. Garrity and Mr. Hurst. The evidence submitted in writing we don't object to.

The Court: That's right. The objections you have given at the bench, Mr. Maguire, let it be understood, are correlated to the objections you make. I want to save all your rights.

Mr. Maguire: Thank you, your Honor.

Q. The balance of the conversation that day, Mr. Hurst? A. I asked Mr. Garrity if I could inspect the box, the safe deposit box at the Washington Trust Company, Westerly, Rhode Island. He said Yes, and made a tentative appointment for next Tuesday to go down to Westerly, Rhode Island to inspect this box.

Q. Directing your attention to November 26, 1951, sir, was [609] something done again in connection with the tax matter of Lieutenant Massei? A. Yes. Mr. Garrity brought to my office certain savings bankbooks of accounts of Mr. or Mrs. Massei or Mr. and/or Mrs. Massei.

Q. Can you help us, sir, by telling us whether you had prior knowledge of the existence of any of the accounts represented by those bankbooks? A. Yes, I had prior knowledge.

Q. You had prior knowledge? A. Yes.

Q. Directing your attention to the 27th of November, which was the following day, was something done in the course of your investigation of this matter? A. Yes. I

went to Westerly, Rhode Island, to look at the safe deposit box at the Washington Trust Company.

Q. How did you go to Westerly, Rhode Island? A. In my own car.

Q. Who accompanied you there? A. Mr. Garrity and Revenue Agent Louis Calatrello.

Q. And when you arrived at Westerly, Rhode Island, did you meet someone there? A. I met Mr. Massei.

Q. Where did you meet him? A. In the Washington Trust Company.

[610] Q. Did there come a time when the safe deposit box was opened? A. Yes.

Q. Who was present when the safe deposit box was opened? A. Mr. Massei, Mr. Calatrello, Mr. Garrity and myself.

Q. And were the contents of the safe deposit box inventoried? A. Yes.

Q. Did an examination of the contents of the box reveal any cash, sir? A. No.

Q. While you were in the safe deposit box or rather in the conference room, did you on that occasion have some talk with the defendant, Lieutenant Massei? A. Yes.

Q. Will you tell us what you said to him, sir, and what, if anything, he said to you in reply?

The Court: Well, was anyone else there?

Q. Who else was present? A. Mr. Garrity, Mr. Calatrello.

Q. Will you tell us what you asked of Lieutenant Massei and what, if anything, he said in reply?

Mr. Maguire: Your Honor, we have no objection to any testimony from the defendant or his counsel with the defendant there just so long as it is relevant.

The Court: I am admitting it. Your rights are saved.

Q. Please—? [611] A. Among other things I asked Mr. Massei the source of all the money, or words to that

effect, and he replied that it came from many different people at different times. Now—

Mr. Maguire: Just—

Q. Have you finished?

The Court: Go ahead.

A. I believe he also said, "Many years ago—".

Mr. Maguire: Just—

A. [Continuing] My recollection is that he said, "Many years ago" in the same sentence.

Q. What next happened, sir? A. Mr. Garrity interrupted or broke into the sentence, and he said that he got this money from letting liquor trucks roll down Shrewsbury Street in Worcester in substance.

The Court: Was the defendant Massei there?

The Witness: Yes.

The Court: Did the defendant Massei say anything?

Mr. Koen: You mean following this statement by Mr. Garrity?

The Court: Yes.

The Witness: I don't recollect him—

The Court: Do you remember whether he did or not?

The Witness: I don't remember.

Q. Was that the entire conversation, Mr. Hurst, as you now remember it? [612] A. No.

Q. Tell us what the balance of the conversation was, if you will. A. I also asked Mr. Massei about jewelry, and Mr. Massei said that he had a ring that he bought years ago, and the amount was $187, that he bought it from a used car dealer named Nate Kerlin.

Q. What? A. A used car dealer named Nate Kerlin. He also said that he had a stickpin that he paid $50 for, also many years ago. There was some additional conversation about some of the items.

Mr. Maguire: If your Honor please, just what he said.

The Witness: I can't remember what else he said, but there was some additional conversation.

Q. Were there other matters discussed, if you can't remember what was said? A. Some of the documents—

Mr. Maguire: Just answer the question.

A. [Continuing] —were discussed, yes.

Q. What other matters were discussed in addition to those you already testified to by subject, since there is objection? A. There were real estate deeds, a fire insurance policy. There were receipts that were discussed. The memorandum from which I could refresh my memory had been marked for identification.

Mr. Koen: May I have that, sir?

[613] [The Clerk hands document to Mr. Koen.]

The Court: Why don't you let him take that, Mr. Koen?

Q. For the purpose of refreshing your recollection, sir, will you read that over, and after you have read it I will ask you a question.

The Court: That is when you have finished reading it. Now you just take your time.

[A pause.]

Q. Have you examined the document? A. Yes, sir.

Q. And you have read it, correct? A. Yes.

Q. And does that reading of the document refresh your recollection as to the subjects which were discussed in addition to those you have already testified to? A. Yes.

Mr. Maguire: Your Honor, I wonder if we might have for the jury what this document is that he is using to refresh his memory?

The Court: Well, he can use it if he says it is what refreshes his recollection, so he can testify with his memory refreshed by the memorandum. I will let you take it on cross.

Mr. Maguire: I don't object to it. I want it identified for the jury.

Mr. Koen: It will be identified at the proper time, [614] may it please the Court.

The Court: All right. Go ahead.

The Witness: Would you repeat the question, please?

Q. All right. Having used that to refresh your recollection, does it help you as to the other subjects that were discussed that day? A. There was some discussion about receipts for monies which we found in the box in connection with the purchase of lots in Westerly, Rhode Island.

Q. What receipts, sir? A. There was a receipt dated October 2, 1948 for $800 signed by Carrie L. Saunders.

Q. What else, sir? A. There was a receipt dated January 15, 1947 for $800 signed by Mrs. Margaret Whitford. There was a receipt signed by Carrie L. Saunders, dated July 23, 1948, for $200. There was also a discussion about home furnishings bought in Westerly, in 1948.

Q. With whom was that discussion? A. I can't recollect who gave me the answer on that.

Q. Well, was the discussion in the bank or outside the bank? A. In the bank.

Q. Who was present in the bank? A. Mr. Garrity, Mr. Massei and Mr. Calatrello and myself.

Q. Did you get the information from Mr. Calatrello? A. No.

[615] Q. Well, there was left Mr. Garrity and Mr. Massei. Is it fair to say that the information came from one of the two of them? A. Yes.

Q. Tell us what that discussion was, please, as near as you can recollect it. A. Yes. There was a stove, a kitchen set, an icebox, which had been purchased for this new house in Westerly for approximately $800. We were told that it was bought for cash in three or four payments in 1948 for approximately $800 in Westerly.

Q. Did there come a time when you left the bank that day, sir? A. Yes, that time came.

Q. And did the four who you previously mentioned leave the bank at the same time or approximately the same time and join someone else? A. Yes. We all left the bank together.

Q. And whom did you meet, sir? A. Mr. Garrity met Mrs. Massei, if that is what you are asking.

Q. Yes, sir. Did Mr. Garrity have a conversation with Mrs. Massei? A. Yes.

Q. Did you overhear the conversation? A. I did not.

Q. Was there a question asked of Mr. Garrity prior to his talk with Mrs. Massei? Was a question asked by you? [616] A. Yes.

Q. And following the conversation that you had with Mr. Garrity, and following the conversation that Mr. Garrity had with Mrs. Massei, did you then have a conversation again with Mr. Garrity? A. Yes.

Q. What did Mr. Garrity say? A. Mr. Garrity said that the origin of deposits in the Washington Street Trust Company bank account in Westerly were probably dividend checks.

Q. All right. Did the group then break up, sir? A. Yes.

Q. And where did you go? A. I went to Worcester.

Q. And who traveled to Worcester with you? A. Mr. Calatrello.

Q. And did you later rejoin, that is the group rejoin in Worcester? A. Not the group, no.

Q. Well, were you rejoined by one of the parties in Worcester? A. I later met Mr. Garrity in Worcester.

Q. All right. While you were in Worcester, sir, did you do something in connection with the investigation of this tax matter involving Lieutenant Massei? A. Yes. I went back to Reed and Company and picked up some infor-

mation, and gave them back some data I had picked up before.

[617] Q. And following that you met Mr. Garrity and you all returned to Boston? A. Yes.

Q. Directing your attention to November 29, sir, did you do something in connection with the investigation of this case? A. Yes, I went to Worcester again.

Q. What did you do that day, sir? A. I went to the People's Savings Bank in Worcester and took some photostats of some of their records pertaining to the Massei account. I also went to the Worcester Mechanics Savings Bank and the Worcester County Institution for Savings and also saw Mr. Davis at the Worcester County Trust Company, all in connection with this case.

Q. Directing your attention to the 30th of November, 1951 did you meet Mr. Garrity on that date, sir? A. Yes, he came up to my office.

Q. At what time? A. About three o'clock.

Q. Was that the time of your appointment with him on that day? A. No, I had had an appointment for 1:30 but he cancelled that.

Q. How was that appointment made, sir, by telephone or by some other form of prearrangement, if you know? A. You are talking about the 1:30 appointment or the three o'clock?

Q. The 1:30. [618] A. I can't recollect now.

Q. Was the 1:30 appointment kept? A. No.

Q. Did you see Mr. Garrity later on on that date? A. Yes, at three o'clock.

Q. Tell us what the conversation was you had with him on that date. A. I asked him for the official police record on Mr. Massei on that day. I asked him for two statements which had been missing on the Worcester County Trust Company account of Isabel C. Massei which he had not yet given me. I asked him again to bring Mr. Massei in

for a sworn or an oral statement. I asked him for any information he might have with respect to any vacations which Mr. or Mrs. Massei had had. I asked him if he had any information with respect to any gifts to relatives which Mr. and/or Mrs. Massei had made.

Q. What did Mr. Garrity say to that, sir? A. He would get me all the information that I had asked for. He would get the police record and the data on vacations and gifts and the two statements.

The Court: You mean personnel record?

The Witness: That's right, the personnel record as a police officer.

The Court: By that you mean his various assignments?

The Witness: Yes.

[619] The Court: His various steps along the highway of promotion. I just say that so you won't have any misunderstanding. Police records have several connotations.

Mr. Koen: It probably should have been—

The Court: You intended it that way, Mr. Koen. It is perfectly all right. I wouldn't accuse you of doing other than that.

Q. In accordance with your request did you obtain from Mr. Garrity an official record of Mr. Massei as a member of the police force of the City of Worcester? A. I obtained a record signed by the Chief of Police, yes.

Q. From Mr. Garrity or did you obtain it yourself? A. From Mr. Garrity.

Q. And the missing bank account statements, were those at some time later received by you? A. I believe much later, yes.

Q. And from whom did you receive those, if you remember? A. I don't remember.

Q. Now, was there anything else discussed by you and Mr. Garrity on the 30th of November, 1951? A. We had

a discussion about $85,000, which were the proceeds, and approximately the cost of the annuities.

Q. And what did Mr. Garrity say about that, sir? A. Mr. Garrity said that the $85,000 used to purchase the annuities was on hand in 1945 and was received before 1945.

[620] Q. Was that the entire conversation on that day, sir, as you remember it? A. I have a recollection there was also discussed the police record, personnel record, of Mr. Massei at that time and Mr. Garrity said that Mr. Massei had been a police officer on Shrewsbury Street from 1923 to 1931; that he had been on the vice squad at various times from 1933 to 1943; and that subsequent to 1943 he had been on personnel work and licensing board duties in Worcester and subsequent to that conversation I obtained this official police record.

Q. Directing your attention to the 5th of December, 1951, sir, did you do something in connection with the investigation of this matter involving Lieutenant Massei? A. I went to the Worcester County Registry of Probate, yes.

Q. What did you do there, sir? A. I looked up the Pilade Massei estate.

Q. What did you find? A. I found a will, I found no inventory, no accounting.

Q. With reference to that matter and the possible inheritance under that estate, did you do anything else in connection with that item at some time, Mr. Hurst? A. Well, on December 6 I asked Mr. Garrity to find out if John Bianchi had the inventory with respect to that will and later I went to see Mr. Bianchi myself, on December 26th.

Q. Did you go anywhere else at any time in connection with this [621] phase of the investigation? A. I also went to see Edward Massei later in the case, on January 17, 1952.

Q. Anywhere else? A. I also checked, at some time,

the Inheritance Tax Division of the Commonwealth of Massachusetts.

Q. Do you know the date? A. I don't remember.

Q. What was the result of the check made there, sir? A. No information with respect to this estate.

Mr. Koen: Do you have an objection?

Mr. Maguire: No. I thought it was going to be an official record.

Mr. Koen: No, sir.

Q. Directing your attention to the 6th of December, 1951, Mr. Hurst, were you in communication with Mr. Garrity? A. On the telephone, yes.

Q. Tell us what that conversation was. A. Mr. Garrity informed me that he had the answers to a number of items that I had asked him to find answers for.

The Court: I think we will pause here. It is four o'clock. And, Mr. Foreman and Ladies and Gentlemen of the Jury, with the same admonition I have already given you, go home, and let's hope the Divine Providence will give you a lot of sunshine and I hope we have no unhappy news tomorrow and, God [622] willing, we will see you at 10 o'clock tomorrow morning.

[Adjournment to 10 a.m. Thursday, April 12, 1956.]

[623] EIGHTH DAY

Court Room No. 5,
Federal Building, Boston
Thursday, April 12, 1956

[Without the jury.]

[Conference at the bench:

The Court: I am going to make an order now on the documents that have been offered for identification, they are to be turned over to the United States Attorney, to be available. I think it wasn't the proper thing,

Mr. Maguire, to have made a copy of that. When documents are offered for identification they are to be used solely for that purpose. So as to eliminate any possibility of argument, anything that you offer for identification will be held by you to be available at the time that it is needed for a witness on the witness stand and documents for identification are to be turned over to Mr. Koen. Mr. Walsh, the documents that have been offered for identification will now be turned over to Mr. Koen, the Assistant United States Attorney, to be available at a time when the Court feels that they are necessary, for the protection of either party.

Mr. Maguire: Your Honor, on another subject, the brief which we filed in connection with this voir dire [624] examination, may I ask that it be included in the record? In other words, these cases.

The Court: No, I am not going to include it. I don't think it has any part of it. It was a memorandum that was filed that was left entirely to counsel. Counsel filed it for the benefit of the Court and the record is cluttered up enough now, isn't it? You can use it—it has no standing except in so far as it served, very properly, as a yardstick to enable you to establish the points upon which you predicated your claim. I have studied them, and I have studied the United States Attorney's and I have made my rulings.

Mr. Maguire: May my rights be saved, your Honor?

The Court: I don't know what rights you have on them. What do you say, Mr. Koen, about them being made part of the record?

Mr. Maguire: I would just as soon have the government's brief as well, your Honor.

Mr. Koen: My thought is that—I don't know the

exact answer, but my thought is that the briefs were submitted merely for the purpose of aiding the Court in arriving at a determination on the narrow issue, in the absence of the jury.

Mr. Maguire: You will recall yesterday when we first came up to this problem, I came to the bench and [625] stated briefly what my objections were, and I tried at that time to incorporate all of the arguments which were advanced at greater length in our brief and that is why I want it included in the record, your Honor. At that time, instead of wasting time—

The Court: I will rule on that later on. As it strikes me now, I don't think they are part of the record. The proper way to raise objections is to raise them, as you have been, at the bench. I am certain, very frankly, if there is anything that either side cares to add—of course the government has no right of appeal and if there is anything that counsel feels he neglected to add which will serve as a source of protection for this defendant, I want to say to you now if it is within the orbit of my discretion I will allow you to add anything that you feel is necessary to set forth your reasons in connection with any objection you made because I think that is a milestone that is not only helpful to have an appellate court understand the situation if the case ever gets there and, secondly, I think fundamentally it goes to the very essence of what a fair trial should be.

Mr. Maguire: Thank you, your Honor—

The Court: I want the defendant to have a fair trial, the same as I want every defendant, but I [626] also want the government to have its day in court, too, fairly and squarely.

Mr. Maguire: Fine. I would then, if your Honor please, like to have this brief included in the record.

The Court: Well, the difficulty with your brief is the brief is a matter, the substance of which can be made of importance later on. There is a modus operandi by which that comes to an appellate court and it is expressed in a very simple phrase, the defendant's brief.

Mr. Maguire: Again, if your Honor please, at the time before the jury, when this evidence started to go in, as we stepped to the bench I stated very briefly what my reasons were. I didn't want to go through them; you heard them all.

The Court: I didn't limit you in your reasons. I gave you every opportunity in the world to state them and if there is anything you have neglected, I will give you a fair chance to fill it in.

Mr. Maguire: At that time I thought I was incorporating, in my reasons, this brief.

The Court: If there is anything you haven't said in connection with your objection to that evidence which you feel does not cover the whole overall picture, I will give you permission to say anything [627] which will go into that record which can be added to what you have already said. I will give you permission to do that later on, just as though you said it. I want you to know that I think that there is an obligation upon the part of the Court, as it was expressed very well in one of the decisions, the Court has to be very diligent, and I am trying to be, in these cases. I try to do it in every criminal case.]

The Court: Counsel has been very deferential to the Court, both counsel for the government and counsel for the defendant, and we have had a very orderly trial, which I think is worthy of commendation. It is nice to have a case that way. You are doing your duty by your client

and Mr. Koen is doing his duty, as his distinguished associate is, and everyone is having their day in court.

All right; bring the jury down.

[628] [The jury entered the court room at 10:23 a.m.]

The Court [to jury]: I have been having a conference with counsel at the bench, with a desire on my part to have nothing presented before you except that which is applicable evidence so you won't be prejudiced.

All right, Mr. Koen.

Mr. Koen: Mr. Hurst, will you take the stand again, please.

HAROLD HURST, Resumed

Direct Examination by Mr. Koen, Continued

Q. I think when we adjourned yesterday afternoon, Mr. Hurst, we were talking about December 6, 1951. In connection with your investigation of this tax matter involving Lieutenant Massei, did you go anywhere on the 7th of December, 1951? A. Yes, I went to Mr. Garrity's office.

Q. And did you obtain something there? A. Yes, I obtained a letter from Mr. Garrity to me.

Q. Was that the first letter which you had received from Mr. Garrity in connection with this matter, sir? A. No, I believe there was a prior letter or letters.

Q. I show you this letter, sir, and I ask you if you can tell us whether or not that is a letter which you received from Mr. Garrity's office on the 7th of December, 1951? A. My best recollection is it is.

Q. Now I show you two other letters, and I ask you, sir, if you [629] had received this letter prior to December 7, 1951? A. Yes.

Q. From whom had you received it? A. Mr. Garrity.

Q. In connection with what? A. In connection with the Massei case.

Q. All right, sir. Will you identify those three letters for the record at this time, sir? A. One letter, dated November 19, 1951, addressed to Intelligence Unit, Treasury Department, 40 Central Street, Boston, Attention Special Agent Hurst, re William V. and Isabel Massei, 29 Chrome Street, Worcester, Massachusetts, signed by W. Arthur Garrity, Jr.

Another letter, dated November 28, 1951, addressed to the Intelligence Unit, Treasury Department, 40 Central Street, Boston, Massachusetts, Attention Special Agent Hurst, re William V. and Isabel Massei, signed by W. Arthur Garrity, Jr.

A third letter, dated December 6, 1951, addressed to the Treasury Department, Intelligence Unit, 40 Central Street, Boston, Massachusetts, Attention Special Agent Hurst, re William V. and Isabel Massei, signed by W. Arthur Garrity, Jr.

Q. Did you receive another letter in connection with this tax matter from Mr. Garrity, which was dated December 11, 1951 [handing]? A. Yes, I did.

[630] Q. Will you identify that for the record? A. This letter is dated December 11, 1951, addressed to Treasury Department, Intelligence Unit, 40 Central Street, Boston Massachusetts, Attention Special Agent Hurst, signed by W. Arthur Garrity, Jr.

Q. I show you another letter, sir, and ask you to identify that for the record. A. This is a letter, dated November 15, 1951, addressed to Intelligence Unit, Treasury Department, 40 Central Street, Boston, Massachusetts, Attention Special Agent Hurst, re William V. and Isabel Massei, 29 Chrome Street, Worcester, Massachusetts, signed by W. Arthur Garrity, Jr.

[Said letters handed to Mr. Maguire.]

Mr. Maguire: No objection, Mr. Koen. You may offer them.

Mr. Koen: I offer this group of letters, your Honor.

The Court: These letters—you don't object to them?

Mr. Maguire: No, no objection, your Honor. That is correct.

The Clerk: Government's Exhibit 39 received in evidence.

Mr. Koen: They have been marked before?

The Clerk: They have previously been marked, Mr. Koen.

[Group of five letters marked Government's Exhibit 39.]

[631] Mr. Koen: May I show them to the jury?

The Court: May I take a look at them first?

Mr. Koen: Yes, sir [handing].

The Court: I think, Mr. Koen, the letters should be read into the record, if you please.

Mr. Koen: Any choice as to who shall read them, sir?

The Court: I suggest you put your distinguished young assistant to work.

Mr. Koen: If you will, Mr. DiMento [handing]. They are in chronological order.

The Court: You don't care who reads them?

Mr. Maguire: No; but will you instruct Mr. DiMento to read with some expression, if your Honor please?

The Court: I will instruct him to read them in keeping with the traditions of his Alma Mater.

Mr. DiMento: Since there are no intonations in the letters themselves, I'll just read the words.

This is a letter dated November 15, 1951—I'm taking them in chronological order, addressed to the Intelligence Unit, Special Agent Hurst [reading]:

"Dear Sir:

"On November 8, 1951, Mr. Massei received your letter dated November 7th and directed me to contact you regarding the question of additional income tax

liabilities owed by him and his wife [632] for the years 1945 through 1950 inclusive. I was unable to reach you on the 8th and, therefore, conferred with Mr. Ierarde as to the steps which the taxpayers might take toward cooperating with you. On the following day, November 9th, the taxpayers and I saw Messrs. Ierarde and Pastore and agreed upon a method whereby the taxpayers would deposit in escrow the total amount of cash realized by them from the surrender of certain life insurance policies which they held with the John Hancock Life Insurance Company until September 29, 1951. Pursuant to this agreement, on yesterday, November 14th, the taxpayers delivered to W. J. Wall, Head Cashier in the office of the Collector of Internal Revenue for Massachusetts, the sum of $84,000.00 for deposit in the Federal Reserve Bank of Boston. This sum was placed in a 9-B-D account in order to insure collection by the Government of any liability which might be found due for the year 1945 through 1950 inclusive. I have today received from Mr. Wall the Collector's official receipt for this payment.

"I am endeavoring to procure the complete picture of the taxpayers' finances. I expect to have all this information in detail by the end of [633] next week. Meanwhile, I want you to have the following information.

"The four payments to the insurance company were on the following dates and in the following amounts:

August 8, 1945	$ 9,162.20
August 8, 1945	18,532.34
August 7, 1946	26,212.40
April 12, 1950	29,947.80

"A complete list of stock owned by the taxpayers on December 31, 1950, together with dates of purchases and amounts paid is as follows:

50 s.	Higgins, Inc., Purchased	4/10/46	550.00
50 s.	Higgins, Inc., "	12/28/50	100.00
100 s.	New Eng. Elec. Sys.	6/26/47	1,462.50
10 s.	Amer. T. & T.	6/26/47	1,579.62
10 s.	" " " "	11/13/47	1,545.62
100 s.	New Eng. Elec. Sys.	12/11/47	1,191.15
1 s.	First Nat. Bank of N.Y.	12/19/47	1,255.00
300 s.	New Eng. Elec. Sys.	12/30/47	3,610.59
20 s.	Amer. T. & T.	12/31/47	3,033.97
25 s.	United Aircraft	3/25/48	714.35
100 s.	New Eng. Elec. Sys.	4/ 2/48	1,128.33
100 s.	New Eng. Elec. Sys.	8/24/48	1,103.21
25 s.	Bond Stores	6/15/49	439.73
[634] 25 s.	Howard Stores	6/17/49	332.77
10 s.	Amer. T. & T.	6/20/49	1,393.15
25 s.	duPont	7/14/50	1,731.67

"A complete list of bank accounts and amounts therein on December 31, 1950, is as follows:

Mechanics Savings Bank	48.11
Worc. County Inst. for Savings	15.40
Peoples Savings Bank	24.42
Worc. Five Cent Sav. Bank	46.05
Washington Trust Co. (Westerly, R. I.)	542.50
Worc. County Tr. Co., check. acct. #1792	2,744.76
Federal Savings and Loan	2,396.68

"On December 31, 1950, Mr. Massei had a credit in the Police Credit Union in the amount of $1,312.75. On that date, he was indebted to the Worcester County Trust Company in the amount of $5,000.00 on a construction loan, the proceeds of which were used in the construction of the Westerly, Rhode Island property described below. On that date, the tax-

payers also owned certain war bonds presently located in a safe deposit box in Worcester. As yet I have been unable to ascertain their precise amount, but the taxpayers are obtaining these bonds for your inspection.

[635] "A complete statement of the real estate owned by the taxpayers on December 31, 1950, is as follows:

"a) One-half interest in a three-tenement house at 29 Chrome Street, Worcester. The house is owned jointly by Mr. Massei and his brother Edward H. Massei. It was received as a gift from their father who died February 2, 1949. The taxpayers live in the second floor flat. The brother, Edward H. Massei, and his family occupy the first floor tenement.

"b) A house at 59 Shore Road, Westerly, Rhode Island, owned jointly by Mr. and Mrs. Massei. They deposited $9,000.00 in stock with the Worcester County Trust Company on March 30, 1947, to secure a construction loan of $5,000.00. This house has been constructed principally by Mr. Massei's own labor. It is finished on the outside but is not finished or plastered on the inside. The Masseis have been negotiating for the sale of this property for several months, and it is likely that a sale will be effected within the next two weeks. These facts were related to Mr. Ierarde, and the offer was made to place the proceeds of this sale in escrow similar to the [636] proceeds of the insurance policies.

"c) Three adjoining lots of undeveloped land on Bayberry Road in Westerly, Rhode Island, owned by the taxpayers jointly. I do not as yet have the exact date of acquisition. The cost was $1,200.00, paid in cash.

"I hope to see you tomorrow that we may confer on other aspects of this case.

Very truly yours,
(Signed) W. Arthur Garrity, Jr."

[637] Letter dated November 19, 1951, addressed to the Intelligence Unit, Treasury Department, Attention: Special Agent Hurst:

"Re: William V. and Isabel Massei
29 Chrome Street
Worcester, Mass.

Dear Sir:

Supplementing my letter to you dated November 18, 1951 I was able to procure further information from the taxpayer since conferring with you on Friday of last week, November 16th, toward answering several questions which you raised at the time.

From what broker did the taxpayer purchase the Higgins and DuPont stock listed in my previous letter? Did the taxpayer trade with any brokers other than Reed and Company in Worcester and Hayden Stone & Company in Boston? The DuPont stock was purchased from Reed. The Higgins stock was bought from H. P. Wood & Company of Boston. The taxpaper has never bought any stock from any other than these three brokers.

Is there any real estate owned by the taxpayer in addition to that listed on page 3 of my letter of November 15th? Does the taxpayer have any property standing in his name as a straw? He does own jointly with his wife, 4 lots on undeveloped land adjacent to [638] the lot on Shore Road, Westerly, Rhode Island on which his house stands. It was through inadvertence that this property was first omitted, it having been thought of as Shore Road property. Neither

the taxpayer nor his wife holds any property as a straw for any one else.

What automobiles has the taxpayer owned since 1945?

A. A 1940 Dodge, exact purchase date unknown, sold in 1946 to Mr. Massei's brother-in-law for $673. This sale was contemporaneous with his purchase from the George Motor Company, Shrewsbury Street, Worcester of

B. A 1946 Dodge of which the purchase price was about $1300.

C. A 1946 Dodge from George Motor Company on March 10, 1948; $400 was paid for the new car together with a trade-in allowance of $1407.40 for the 1946 car.

D. 1949 Dodge purchased from George Motor Company on March 28, 1949; trade-in value for 1948 car was $1607.45 and $679.60 was paid in addition.

E. 1946 Ford purchased from Heywood-Brunmark Company of Worcester on March 16, 1950 for $900; sold August 30, 1951 for $865.

F. 1950 Dodge bought during December 1950 from George Motor Company for a trade-in on the 1949 [639] Dodge together with a payment of $600.

All these cars were registered in Massachusetts with the exception of the 1946 Ford which was registered in Rhode Island, because this car was used almost exclusively in connection with the taxpayer's house in Westerly, Rhode Island.

How much work did the taxpayer perform with his own hands in connection with the construction of the Westerly house? He did all of the manual labor without help from anyone after the contractor had constructed the house proper. He cleared the land himself, dug holes for a dry well, did the grading, painted

the window frames and trimming, and made the window shutters.

Does Mrs. Massei wear furs and jewelry? No. No furs or jewelry have been purchased since 1945. She bought a relatively inexpensive fur coat on February 18, 1944 and has one inexpensive diamond ring, a gift from her husband many years prior to 1945.

Has Mrs. Massei inherited or received as a gift any money or other valuables? No, not at any time.

Has the taxpayer made any gifts or received gifts from his sisters Ann Moretti or Lena Massila? No, none given or received.

Has the taxpayer made any loans or gifts to his brother [640] Edward? Yes, one loan of $4500 within the past year. (I am unable to find among my own notes the exact date of this loan, although I can recall the taxpayer furnishing me with this information.)

Does the taxpayer or his wife own any equities in any business? No.

Has the taxpayer copies of tax returns filed before 1945? Probably not. So far he has been unable to locate any.

Has the taxpayer any safe deposit vaults other than the Worcester and Westerly boxes already known to you? No.

Together with Mr. and Mrs. Massei I am obtaining further information in answer to question of la[illegible] Friday. I expect to have more when we meet [illegible] Worcester tomorrow at 1:30 p.m. but you may inspect the contents of the Worcester Safe Deposit box.

Very truly yours,

W. Arthur Garrity, Jr."

Letter dated November 28, 1951 addressed to the Intelligence Unit, Attention: Special Agent Hurst:

"Re: William V. and Isabel Massei

"Dear Sir:

The employment record and annual salary of Mr. Massei is as follows;

[641] *Years*	*Place of Employment*	*Annual Salary*
1916-17	Lincoln Park Amusement Co.	$1800
1917-18	American Steel & Wire Co.	$2750
May 29, 1918 to Jan. 20, 1919	U. S. Army	
1919-23	American Steel & Wire Co.	$2500
1923-1938	Police Patrolman	$2184
Oct. 11, 1939 to Sept. 9, 1947	Police Sergeant (*Salary increased to $3500 in 1945)	$2990*
Sept. 8, 1947 to Date	Police Lieutenant	$4158

When first appointed in 1923 Officer Massei was assigned to State 1, the 'Lake District'. The principal street on his beat was Shrewsbury Street. When weather permitted he patrolled this area on motorcycle. For about one year in 1924 he was assigned to the Vice Squad, and in 1925 he was returned to his original 'Lake District' assignment. On December 4, 1931 he was injured while on motorcycle in an accident, the report of which I furnished you on November 26th. On his return to duty on April 20, 1932 he was appointed to the Vice Squad. For about a year during 1933-34 he was assigned to the ambulance de-

tail. Toward the end of 1934 he was assigned to the Vice Squad. There he [642] remained until early in 1935 when he was again assigned to Station 1 and again patrolled the so-called 'Lake District'. In 1937 he was again assigned to the Vice Squad and was attached to that department (except for a three month period from October 11, 1939 to January 6, 1940 when he was in charge of the night complement at Station 1) until 1943. On January 6, 1940 he was designated to command the Vice Squad, which theretofore had operated directly under the supervision of the Chief of Police. In 1943 he was transferred to the Personnel Division and has continued in that capacity ever since, except for the period of about a year during 1947 when he supervised taxicab licenses and regulations.

I am today having photostated the various receipts and bills shown to you yesterday in Westerly, Rhode Island, among the contents of the taxpayers' safety deposit box there. I hope to have them in your office tomorrow.

Very truly yours,

W. Arthur Garrity, Jr.

Letter dated December 6, 1951 addressed to the Treasury Department, Attention: Special Agent Hurst:

"Re: William V. and Isabel Massei

Dear Mr. Hurst:

[643] You had a number of questions regarding checks drawn by the taxpayers, when we conferred last week. The answers follow:

(a) Check to the New Ocean House, Swampscott, 1944—Mrs. Massei is a member of the Daughters of the American Revolution and attended a two-day con-

ference at the Hotel, for which expense this check was drawn;

(b) Check to Hotel Knickerbocker, 1948—Mr. Massei's niece flew from California to visit them. These checks were for the hotel bills at the time of her arrival and departure;

(c) Check to Prudential Life Insurance Company, 1950—This insurance is on the life of Mrs. Massei's mother, Mrs. George Cummings.

(d) The check to the brother in the amount of $145.00 cashed by Antonio B. DiReda—Mr. DiReda sold the building in which Edward Massei's printing business is located to Edward Massei. This check was in part payment of the price.

(e) Edna M. Bailey is a friend of Mrs. Massei who left with her a fur coat which Mrs. Massei sold on the Bailey woman's behalf. It was remodeled by Mr. Weinstein, to whom a check was also drawn at about the same time, to be remodeled and then sold by Mrs. Massei. [644] The Bailey check was the proceeds of the sale.

Very truly yours,

W. Arthur Garrity, Jr."

Letter dated December 11, 1951, Treasury Department, Attention: Special Agent Hurst:

"Dear Sirs:

Delivered with this letter please find the following documents relating to the tax investigation of William V. Massei:

a) A statement by the Chief of Police of Worcester dated December 8, 1951, listing Officer Massei's duty assignments.

b) A photostatic copy of Mrs. Massei's checking account at the Worcester County Trust Company

showing entries from November 10, 1945 to February 6, 1946.

c) A photostatic copy of Mrs. Massei's checking account at the Worcester County Trust Company showing entries from February 10, 1946 to April 18, 1946.

Very truly yours,

W. Arthur Garrity, Jr."

Q. Mr. Hurst, directing your attention now to the 26th day of December, 1951. I am not too sure we covered that yesterday, sir. Will you tell us what happened on that day in connection with the investigation? A. I went to Worcester on that day and I saw Mr. Bianchi, the [645] executor of the Pilade Massei will.

Q. Did you also do something—did you place a telephone call? A. I believe I went up to Mr. Garrity's Worcester office and left word for him to call me.

Q. Directing your attention now to the 2nd of January, 1952, in connection with this tax matter of Mr. Massei's, did you see Mr. Garrity on that date? A. Yes, I did.

Q. Where did you see him, sir? A. In my office.

Q. Did you have some talk with him? A. Yes, I did.

Q. What did Mr. Garrity say to you on that occasion?

Mr. Maguire: I assume my objections are continued, your Honor.

The Court: That's right, your objection runs to the whole subject matter.

A. Mr. Garrity said that he wasn't going to bring Mr. Massei in for either a sworn or an oral statement. He also said that—we had a discussion about beginning net worth figure. He said that Mr. Massei had told him that he had between $100,000 and $110,000 net worth as of—before 1945.

Q. Do you remember any other part of the conversation?

The Court: I think that part of the answer which says

he wasn't going to bring him in to make a statement may be [646] disregarded by the jury. That is a statement made by—

Mr. Maguire: Your Honor—

The Court: No, that's all I am going to hear, Mr. Maguire, I am going to ask the jury to disregard that part of it. It is a lawyer's right to say he won't bring his client in. There will be no inference one way or the other.

Mr. Maguire: From the defendant's point of view, your Honor, we are quite pleased to have it stand.

The Court: That's all right. If you don't object—

Mr. Maguire: I don't object. I would like to have it in the records.

The Court: If you don't object, then it may stand. The Court is willing to have the jury disregard it but if you want to have it stand, it may stand.

Q. Directing your attention to the 17th of January, Mr. Hurst, what next did you do in connection with the investigation of this tax matter of Lieutenant Massei? A. I went to Worcester again to see Edward Massei at the Paramount Press. I also saw Mr. Cenedella, the District Attorney, in connection with the case.

Q. On the 18th of January, 1952 did you see Mr. Garrity or did you call Mr. Garrity, rather? A. Yes, I telephoned him.

Q. Did you talk to him? A. Yes, on the telephone.

[647] Q. Tell us what the conversation was, sir. A. Well, I told him I had completed my work on at least some of the bankbooks which he had provided to me and told him he could come up and take them back. I also asked him if he knew whether Mr. and Mrs. Massei were going to go South or not. He said he didn't know.

Q. Did there come a time when Mr. Garrity came to the office for the purpose of picking up those books? A. January 24th.

Q. Did you have some talk with him on that date? A. Yes, I did.

Q. Tell us what you said to Mr. Garrity—did you give him the books and the records? A. Yes.

Q. Tell us what Mr. Garrity said on that day.

Mr. Maguire: May we have who was present? Just the two of them?

The Witness: No. Mr. Calatrello was present.

Q. Tell us what was said, please. A. Well, we had a discussion. I told Mr. Garrity that I thought I would recommend criminal prosecution on this case.

The Court: Do you want this to go in?

Mr. Maguire: If your Honor please, as long as this evidence is coming in, it is the defendant's position we would like the jury to hear everything.

[648] The Court: Do you object—

Mr. Maguire: I object to any conversations—

The Court: Please. I have allowed this to go in on a theory I have already expressed, that I am not going to repeat, and matters that do not come within the purview of that, I am ready to exclude, but if you want it to go in, you assume the responsibility as counsel, I will let you do it.

Mr. Maguire: May I have a minute, your Honor?

[Brief pause.]

Mr. Maguire: Your Honor please, I am not certain what Mr. Hurst at this point is going to testify to. I wonder if we might go to the bench.

The Court: Yes, I would be happy to have you come up.

[649] [Colloquy at the bench, during which the following is recorded:—

Mr. Maguire: As I understand it now, this is conversation, this is what Mr. Garrity stated to him?

Mr. Keen: That's right.

Mr. Maguire: I see. I object to it.

The Court: Well, I want it understood, and of course I want the jury to know, as I tried to do yesterday, that I am limiting this evidence to the question of the authority of the agent to speak for the defendant Massei. When the relationship, client and attorney, and comments made, reach the point where it doesn't represent that, I indicated to you that I would exclude it, and Mr. Koen knows it. He doesn't question that. Mr. DiMento knows it. But the other part, you said you wanted it in, and if you want it in, I will let it.

Mr. Maguire: If your Honor please,—

The Court: Is that right?

Mr. Maguire: If your Honor please, I am confused as to exactly what Mr. Koen is going to bring out from the witness.

The Court: Are you?

Mr. Maguire: Now I understand that it is [650] going to be a conversation with Mr. Garrity, to which we have a continuing objection, if your Honor please.

Mr. Koen: Listen. What the witness will testify to was already testified to on this voir dire. He testified to it from a memorandum he was using and which contains excerpts from his diaries, a copy of which Mr. Maguire has now, I believe.

The Court: But, you see, when I had the board here yesterday, I made a ruling as to what he is going to have. If it reaches the point of a comment, making a statement under oath, I will try to tell the jury to disregard it.

Mr. Koen: So there will be no doubt, I expect—I think this is in the possession of Mr. Maguire—]

The Court: You know, Mr. Foreman, and ladies and gentlemen of the jury, please feel sure that all counsel is

doing here, Mr. Maguire and the United States Attorney, is to follow, to adopt a pattern or formula which will make available to you admissible testimony, not testimony which because it is given you you have to accept, but testimony which you will weigh in conformity with the instruction I will give you, just factual statements; but factual circumstances under certain [651] circumstances admitted would do harm to either side, to the Government or to the defendant. Therefore, that's why we are up here, and very properly so. Every time we do this it is a very, very efficacious way to proceed, and there is no thought or desire to keep anything from the Jury, anything except that which would be proper from the legal point of view for you to receive. I am trying to safeguard the rights of all parties in connection with that as well as I can.

[Colloquy at the bench resumed, and the following is recorded:—

The Court: Now what do you say?

Mr. Koen: I think the witness will testify that on this date that he told Mr. Garrity that he felt he would recommend prosecution. I think he will testify again to a discussion that he had with Mr. Garrity in reference to obtaining money from trucks.

The Court: I will allow that to go in. But the first part, you see, constitutes an expression of a professionally considered judgment on the part of an attorney, and that doesn't come within the orbit of my ruling. I think you agree.

Mr. Koen: I agree to that.

The Court: That's right.

[652] Mr. Koen: But now let me finish so we won't be—

The Court: Do you object to that part?

Mr. Maguire: No, I don't.

The Court: The part that he just said?

Mr. Maguire: That he said he was going to prosecute?

The Court: Do you object to that?

Mr. Maguire: No, I do not. Basically I didn't know. My thought was it might be some other material, other than what Mr. Koen has recited.

The Court: I want you to know now if you object to that I am ready to exclude it because I want it understood, I have made it clear what the orbit of it is, what the boundary lines are as to the admissibility of this testimony. I made it very, very clear. It is limited to the question of the authority of Mr. Garrity as agent of the defendant Massei to speak for him, and whenever he speaks professionally, in the exercise of a judgment which constitutes professional advice, he is acting within the four corners of his obligation to his client. I'll exclude it. But you want it in, and I want it understood, the [653] record will appear now I am ready to exclude it.

Mr. Maguire: What you are ready to exclude is presumably Mr. Hurst's statement to Mr. Garrity that he was going to prosecute. That is what we are talking about.

The Court: He wasn't going to prosecute; he was going to recommend. They don't prosecute, they recommend.

Mr. Maguire: I understand. That is the only thing I have no objection to. The defendant's position is going to be this, your Honor. You have allowed and are going to allow the evidence conversations between Mr. Hurst and Mr. Garrity, and once that evidence goes in, what Mr. Garrity is alleged to have said to Mr. Hurst, as far as we are concerned, the defendant feels they want everything that transpired in the conversation.

The Court: Oh, well, I'm not going to settle it that way. I want it perfectly clear that what I have done, I said the ultimate question of the authority of Mr. Garrity to speak for Mr. Massei, your client, in connection with alleged admissions which would be binding upon the defendant will be for the jury under proper instructions which I will give later on, and I have [654] asked the jury to receive it, to form no opinions, but to receive it as a piece of testimony, as a circumstance, and to wait until they retire to their jury room, if it reaches that point, for deliberation. That's the only time they can settle that, only after I give the proper instructions. And I want it known now that any advice or statement he was not going to—he intended to recommend prosecution, is a statement which I am going to ask the jury to disregard entirely. I think I will exercise my discretion in the light of my obligation to my sovereignty and tell the jury to disregard it entirely. What he is going to recommend, the prosecution, is of no consequence, it isn't a basis for admission, it isn't a basis for anything except a judgment expressed, very properly so—I find no fault with it—certainly not admissible in the trial of a criminal case, and I will ask you to disregard that statement. I think it is highly prejudicial to your client; and I am going to ask the jury, if counsel doesn't object,—I am going to ask the jury to disregard it. A judge owes some duty, and I think I owe that duty.

Mr. Maguire: If your Honor please, may I [655] ask that you tell the jury that we object to anything Mr. Garrity has stated to Mr. Hurst. You are going to allow that question to be put to determine whether he was acting with or without authority.

The Court: I have got it stated on the record.

Mr. Maguire: We object to those statements allegedly made to Mr. Garrity without stating exactly what was said in these various conferences—to do that takes them out of context and makes them—

The Court: This was a considered judgment expressed in words by an agent of the Treasury Department and was no part of the conversation.

Mr. Maguire: It is part of the conversation. He stated that to Mr. Garrity.

The Court: I have only allowed parts of conversations upon which you could predicate admissions, upon which an admission could be predicated on the theory of a relationship of agency.

Mr. Maguire: Well, it is premature, if your Honor please. That is the defendant's position. It is the defendant's position. We are going to come to it later.

The Court: You have already come to it. I [656] have already said you came to it on the voir dire examination. I told the jury what I am going to do, and I am doing my best to protect all rights here. I don't want any inference of any kind drawn. After all, the jury is entitled—you are entitled to have the jury wait until all the evidence is offered on that, and that is the only way I can see that. I can't see it any other way.

Mr. Koen: What you are asking, I understand, is substantially this. You are now asking the Court to give a portion of the charge he has indicated he will give at this stage of the proceeding.

The Court: Well, I am not going to do it. I am not going to give any portion of my charge until I get ready to charge the jury, because I think that is the appropriate time to do it. I have indicated what I am going to do.

I made it perfectly clear to counsel that I considered

it fundamentally a question of law the first day. I gave it thoughtful consideration over night and I decided it was a question of fact for the jury under proper instructions.

Mr. Maguire: That was, of course, over defendant's objection.

[657] The Court: What?

Mr. Maguire: That was, of course, over defendant's objection.

The Court: Oh, yes, your objection is noted to all that. But I made it clear I wasn't going to allow contentions and arguments to go in. I think you make a very serious mistake, Mr. Maguire, to allow this testimony to go in where a man said he was going to recommend prosecution.

Mr. Maguire: It is obvious that he did.

The Court: No, listen. It doesn't make any difference whether he did or not. It is still of no consequence. It would certainly be wrong for me to tell this jury they could listen to it. I have already told them that they could not. I will tell them very carefully in my charge that isn't so, in very strong language, because that is actually what the Government would want me to do.

How do you feel about that, Mr. Koen? I am trying to protect your client. How do you feel about it? I can't protect your client in conformity with your wishes. I have to do it in compliance with the United States Attorney's wishes if I do it at all. I have to do it as a [658] disinterested fellow who is charged with the responsibility of telling the jury what the law is and ruling on it.

Mr. DiMento: Well, your Honor, may I ask this? Does defendant's counsel object to the inclusion of the

evidence as to recommendation of criminal prosecution by Mr. Hurst?

The Court: No, but he has given as a reason the facts, because his reason is he is objecting to the whole thing; therefore, isasmuch as I have ruled, I should rule on the other end. He is putting the onus on my shoulders, and I am not going to rule upon it. If I find something that is argument, I am going to exclude it. Don't you agree with me that I am right?

Mr. DiMento: Well, your Honor, that's a matter of defendant's counsel's objection.

The Court: I don't know whether it is or not. I can show you a case, a decision of the Supreme Court, where they—in this Holland case the Supreme Court said that a judge must be very, very diligent in con c-tion with these matters.

Mr. DiMento: I think you have been diligent, your Honor, in pointing out—

The Court: Oh, I understand; but I think [659] it is highly dangerous to a client.

Mr. Maguire: Well, if your Honor please, I respectfully ask—

The Court: No, what I think you are trying to do, I think you are trying to put me in a box on it.

Mr. Maguire: If your Honor please, I resent that very much.

The Court: Well, that's what I mean. I'm trying to help you all I can.

Mr. Maguire: Well, if your Honor please,—

The Court: I have made it clear, very clear; I have made it so clear that I dictated it to my secretary and had it written out. It is limited to the question of the authority of the agent to speak for the defendant, and other grounds for objection may be raised at the appropriate time. The ultimate question is the authority

of the agent to make admissions binding upon the defendant will be for the jury under proper instructions. Now I wrote that, I dictated that, so that it would be stated verbatim, and I'm not going to enlarge it.

Mr. Maguire: Well, I think we are going to come to this question—

[660] The Court: When we come to the question, I don't know what to do with it. I have advised you not to expect.

Mr. DiMento: You want to do that, your Honor, to the extent of your duty to the defendant.

The Court: I don't know what to do with it.

Mr. DiMento: The record shows it very clearly. The record clearly shows we have extensively discussed this matter with Mr. Maguire.

The Court: I have been very definite about it. Do you want it to go in?

Mr. Maguire: I want everything surrounding this conversation.

The Court: That's the trouble. If that is the reason, I'm going to ask the jury to disregard it.

Mr. Maguire: Save my rights, your Honor.]

The Court [to jury]: The jury will disregard entirely—and I say this now with no reflection on you, Mr. Witness, don't misunderstand me—anything that the agent may have said about recommending criminal prosecution to Mr. Garrity; anything that he may have said about that is to be disregarded by the jury entirely. I do that in the exercise of what I consider to be my obligations to defendant.

Mr. Maguire: If your Honor please,—

[661] The Court: Wait a minute. And with due deference to the rights of the United States. Now, counsel wants it to go in and wants it to go in for a reason that I cannot accept, and therefore I am excluding it. And I don't care

to have any further discussion about it, Mr. Maguire. The jury will disregard that part.

Mr. Maguire: May it appear, if your Honor please, I have requested it?

The Court: No, no, please, Mr. Maguire, I don't want any comments from down there. I have made it clear to the United States Attorney, I have made it clear to Mr. DiMento, I have made it clear to you, and I have instructed you all about carrying out that ruling. You have unhesitatingly come up here to make your objections to the Court, and the jury understands the situation, what I am doing. I am doing it because it's the proper thing to do. I don't want to have anything go in, side remarks or anything that would cause harm in any way. I want this record to be just as free from prejudice and bias as it is possible to have it. My charge to you will be the same, whatever I have to say. I have tried to make that clear.

You may proceed, Mr. Koen.

Mr. Maguire: May I save my rights on the record?

The Court: Oh, your rights are saved to all this.

Q. Mr. Hurst, you heard the remarks of the Court? A. Yes.

[662] Q. All right. Having in mind the statements of the Court, will you tell us the conversation that was held between you and Mr. Garrity on that date, excluding that portion which is the subject of the Court's ruling. A. Mr. Garrity said that the money that showed up on the net worth statement had been accumulated prior to 1945; that Mr. Massei had received gifts, or graft, or call it what you will, when he was a patrolman on Shrewsbury Street between 1923 and 1931, while letting liquor trucks roll through Worcester, and when he was on the Vice Squad between 1933 and 1943.

Mr. Garrity also said that he probably would be willing to pay the deficiencies found by the Revenue Agent.

He said—I said, rather, that I still wanted an affidavit from Edward Massei, which he had not yet provided for me, and that if I could not get it voluntarily, I would get a sworn statement.

[663] The Court: Will counsel come up now, again?

[Conference at the bench:

The Court: I think that that last part of the statement comes within the orbit of what I consider to be a statement that is not a correct statement. I know of no way, under the provisions of the Fourth and Fifth Amendments that a person can be compelled to make a statement under oath. He can't be compelled to do it. There is no way of getting it—

Mr. Koen: No, your Honor. You misunderstood. It is Edward Massei, not the defendant.

The Court: Oh, I beg your pardon.

Mr. Koen: It is the brother.

Mr. Di Mento: He is speaking of the Internal Revenue subpena, that's all.

The Court: I beg your pardon.]

The Court: This relates to Edward Massei. That's all right.

Q. So that there will be no question, Mr. Hurst—

The Court: Any statement you are going to make in connection with this defendant, I would like to have you make that because I thought that is what it was. There is no defendant that can be compelled, himself, to make a statement which will incriminate him because the provisions of the Constitution protect him. He can act through his counsel. He can do it himself, [664] providing he fully understands his rights.

The Witness: Your Honor, I was referring to Edward Massei.

The Court: That's right. So that I was mistaken on that, Mr. Koen.

Q. So that there will be no question, who is Edward Massei, Mr. Hurst? A. Edward Massei is William V. Massei's brother.

The Court: He is the one who has testified.

Mr. Koen: Who has already testified, yes.

The Court: That's right.

Q. Will you continue, Mr. Hurst? A. Yes. Mr. Garrity also stated, in connection with a discussion of accumulation of monies before 1945, that Lieutenant Massei had been assigned to personnel work and licensing board duties all during the period from 1943 to 1950 and therefore was in no position to receive any gratuities.

Q. Directing your attention to January 29, 1952, sir, did you do something in connection with the investigation of the tax matter of Lieutenant Massei? A. Yes, I went to Westerly, Rhode Island and Providence, Rhode Island.

Q. For what purpose, sir? A. I went to Westerly, Rhode Island to see Samuel Urso. Also to get some information from the Washington Trust Company with [665] respect to the Massei account there.

The Court: So that the jury will understand, as I remember it there were two Urso brothers, one of whom was a plumber and the other was a builder, and they have testified. You have been here during the trial?

The Witness: Yes. This is Samuel Urso, the contractor.

Q. When next did you hear from Mr. Garrity in connection with the tax matter of Lieutenant Massei? A. On February 4 Mr. Garrity came up to my office with the affidavit of Edward Massei which I had requested.

Q. When next did you see Mr. Garrity in connection with the tax matter— A. I saw him on February 15 where he brought up consent waivers which he had Mr. and Mrs. Massei sign for Mr. Calatrello. At the same time I also gave him back some checks which I had not given him previously.

Q. And upon the delivery of the checks to Mr. Garrity, what did he do? A. He signed a receipt for them.

Q. I show you this document, sir, and I ask you, if you will, to examine it. A. [Examining.]: Yes, that's—

Q. What is that document, sir? A. This is a receipt dated February 13, 1952 signed by Mr. W. Arthur Garrity and listing a number of checks on the account of [666] Isabel C. Massei drawn on the Worcester County Trust Company.

[Mr. Koen hands a document to Mr. Maguire.]

Mr. Maguire: No objection.

Mr. Koen: I offer it, without objection, that document.

The Clerk: Government's Exhibit No. 42 received in evidence.

Mr. Koen: Without reading them into the record, may it please the Court, may we have the document transcribed?

The Court: That's right, except I would like to have the jury know what it is. I think you better read it and then we can transcribe it.

Mr. Koen: Very well, sir. [Reading]:

February 13, 1952

The following checks of Isabel C. Massei, drawn on the Worcester County Trust Company, Worcester, Massachusetts, are herewith returned:

	Check No.	*Date*	*Payee*	*Amount*
	31	4/24/45	Reed and Company	$3,308.47
	75	4/5/48	Samuel Urso	600.00
	76	4/12/48	Samuel Urso	2,000.00
	80	6/1/48	Samuel Urso	2,400.00
	83	7/13/48	Joseph Urso	770.00
	84	8/26/48	Reed and Company	1,103.21
	85	10/2/48	Albert L. Saunders	600.00
[667]	92	3/28/49	George Motor Company	600.00

Check No.	Date	Payee	Amount
94	4/15/49	Joseph Urso	93.00
99	9/2/49	Albert L. Saunders	400.00
110	12/23/49	William V. Massei	700.00
122	3/16/50	Heywood Brunmark Motor Company	800.00
135	7/17/50	Reed and Company	1,400.00
144	11/30/50	Edward R. Massei	4,500.00
151	12/22/50	H. P. Wood & Company	100.00
152	12/28/50	William V. Massei	1,100.00

W. Arthur Garrity, Attorney"

Q. Directing your attention, sir, to March 21, 1952, did you do something in connection with the investigation of the tax matter involving Lieutenant Massei? A. Yes. I went to the office of Albert L. Saunders.

Q. In connection with what, sir? A. In connection with the sale of two lots in Westerly, Rhode Island to Mr. and Mrs. Massei.

Q. Now, sir, what did you do in connection with the investigation on the 7th of April, 1952? A. I tried to find one Charles F. Baker, to whom a check was made in the amount of $1,025, which I had found among the Massei checks.

Q. Tell us what you did in locating, or attempting to locate, him. A. I went to Whitman and found that Mr. Baker lived in West [668] Bridgewater. As I recollect, the check was paid into a bank in Whitman. I started with this bank in Whitman. They told me—

Mr. Maguire: Wait just a minute.

A. [Continued]: I'm sorry. I went to West Bridgewater as a result of information from the bank and found Mr. Baker had died some months before. I found that his wife worked at an E. P. Fitzgibbons. I went there. His wife was laid off for the day. I finally found his wife at

500 East Center Street in Westdale, and his wife produced some papers relating to a lot in West Harwich, Massachusetts sold to one Jeremiah T. O'Leary of Worcester and William V. Massei in November, 1946 for $2,250. I then went to Barnstable Registry of Deeds to look up the deed and I went to West Harwich and then in the Harwich Town Office found that the title had been registered in 1951, looked at the lot, came home.

Q. Was that the first time you had received any information with reference to Mr. Massei's interest in that particular lot of land? A. My best recollection is that it was the first time.

Q. Had you, prior to that time, requested information with reference to the real estate holdings of the taxpayer, Lieutenant Massei? A. Yes, I had.

Q. And had you received information as to the real estate holdings? [669] A. I had received a letter from Mr. Garrity which listed those holdings.

Q. Was the property owned jointly with Deputy Chief O'Leary listed among the real estate holdings? A. No.

Q. Directing your attention to April 9, 1952 did you have a discussion with Mr. Garrity on that occasion?

Mr. Maguire: What is the date?

Mr. Koen: April 9, 1952, sir.

A. Yes, he came up to my office and I told him that I had discovered this piece of property in West Harwich. He said he knew nothing of it.

Q. Did he say anything else? A. He didn't think that Mr. Massei had any money in this piece of property.

Q. Directing your attention to April 10, 1952 did you do something in connection with the investigation of this tax matter? A. Yes, I went down to Westerly, Rhode Island Town Hall and saw the Town Clerk.

Q. And on what aspect of the investigation of Mr. Mas-

sei's tax matters did you go there? A. I went to get photostats of the deeds and any mortgages in connection with the 59 Shore Drive property.

Q. On the following day were you in touch with Mr. Garrity? A. Yes, on the telephone.

[670] Q. Tell us what the conversation was. A. I still had some invoices which he had provided me with respect to automobiles and I told him I was through with them and he could have them back.

Q. Were they picked up on the 29th of April, 1952, sir? A. I believe I delivered them on the 29th of April, 1952, to Mr. Garrity's office.

Q. Was Mr. Garrity present at that time, sir? A. No.

Q. And upon the delivery of these invoices did you receive a receipt? A. Yes, I received a blanket receipt from his secretary.

Q. I show you this document and I ask you is that the document which you received on that day? A. Yes.

[Mr. Koen hands a paper to Mr. Maguire.]

Mr. Maguire: Your Honor, we will agree that the secretary, Miss De Bois was Mr. Garrity's secretary at that time.

Mr. Koen: And I understand there is no objection?

Mr. Maguire: No objection.

Mr. Koen: I offer it.

The Clerk: Government Exhibit No. 41 received in evidence.

Mr. Koen: May I read this to the jury?

The Court: Certainly.

[671] Mr. Koen: This, Mr. Foreman and Members of the Jury, is on the letterhead of Maguire, Roche & Garrity, Attorneys at law, 10 State Street, Boston, 9, Mass. [Reading]:

"April 29, 1952
Received this day invoices from Mr. Hurst
re: case of William V. Massei
Miss M. L. Du Bois
Secretary"

And there is, in pencil,

"Automobile Invoices—George Motor Co. & Heywood-Brunmark and Pd. note for $5000 on Worcester County Trust Company."

Q. Directing your attention to the 16th of May, 1952, Mr. Hurst, did you see Mr. Garrity on that date? A. Yes, I did.

[672] Q. Can you tell us where you saw him, sir? A. I saw him in the United States Attorney's office in this building, on that date.

Q. Did you have some talk with Mr. Garrity on that occasion? A. Yes, a short conversation.

Q. What did you say to Mr. Garrity and what did Mr. Garrity say to you on that occasion? A. My only recollection on that occasion was that Mr. Garrity told me that he had an appointment with Mr. Altkrug on the following Tuesday.

Q. And who was Mr. Altkrug, sir? A. Mr. Altkrug was then one of the people in the Regional Counsel's office of the Treasury Department.

Q. Now, I show you this document, sir, and I ask you to examine it [showing papers to the witness].

[The witness complied.]

[Mr. Koen showed the document to Mr. Maguire.]

Mr. Maguire: No objection, Mr. Koen.

[Government's Exhibit No. 40 received in evidence.]

Q. Will you identify that document for us, Mr. Hurst? A. This is a receipt signed by W. Arthur Garrity, for records of William V. Massei and Isabel C. Massei of 29 Chrome Street, Worcester, Massachusetts, which were re-

turned to Mr. Garrity, a list of records in detail. Do you want me to read these?

Q. No. Can you help us as to the date that receipt was given? [673] A. It was some time prior to April, 1952, but I don't have any recollection as to the exact date. [A pause.] May I correct myself on that?

Q. Yes, you may. A. Refreshing my memory, I believe the date of this receipt was January 24, 1952.

The Court: Has it been marked as an exhibit, Mr. Koen?

Mr. Koen: It has been, sir.

The Court: Then why not have the contents read to the jury? I think the passing of that around, for several purposes, probably interferes with the orderly processes which I think the jury would prefer, and by which it would be better to have them listen to the testimony.

Mr. Koen: All right, sir. This is a 2-page document, Mr. Foreman and members of the jury, which reads as follows: [reading]

"Records of William V. Massei and Isabel C. Massei, 29 Chrome Street, Worcester, Massachusetts, being returned to W. Arthur Garrity, Jr., attorney for Mr. and Mrs. Massei. The following are the records in detail:

"Savings Share Acct. Book No. 23353, Worcester Federal Savings and Loan Association in the name of Isabel C. Massei, covering the period January 12, 1945, through January 29, 1951.

"Savings Share Acct. Book No. 23352, Worcester Federal Savings and Loan Association in the [674] name of Isabel C. Massei, covering the period January 12, 1945, through January 29, 1951.

"Passbook No. 1792, Worcester County Trust Company, check master plan in the name of Isabel C.

Massei, covering the period May 3, 1943, through June 3, 1950.

"Worcester Police Department Credit Union Book No. 18 in the name of William V. Massei and Isabel C. Massei, covering the period February 1, 1947, through November 1, 1951.

"Savings Department Book No. 50501 in the Washington Trust Company, Westerly, Rhode Island, in the name of Isabel C. Massei, covering the period of July 6, 1950, through June 28, 1951.

"Deposit Book No. 213401, People's Savings Bank, Worcester, Mass., in the name of Isabel C. Massei or William V. Massei, covering the period February 5, 1948, to November 21, 1951.

"Book No. 130332 of the Worcester Mechanics Savings Bank, Worcester, Mass., in the name of Isabel C. Massei, covering the period March 4, 1939, to November 29, 1950.

"Deposit book No. 308448 of the Worcester Five Cents Savings Bank in the name of Isabel C. Massei or William V. Massei, covering the period [675] May 1, 1945, through November 29, 1950.

"Book No. 295415, Worcester County Institution for Savings in the name of William V. Massei or Isabel C. Massei, covering the period December 4, 1935, through November 21, 1951.

"Check stub book of the Worcester County Trust Co., check master plan covering period December 7, 1944 (check No. 25) to April 17, 1946 (check No. 48).

"A deposit slip book Worcester County Trust Company. Deposits to the account No. 1792, Isabel C. Massei containing 12 deposit slips for the year 1950.

"Bank statements and cancelled checks of account No. 1792, Worcester County Trust Co. in the name of Mrs. Isabel C. Massei, 29 Chrome Street, Worcester,

Massachusetts. Twenty-nine bank statements with cancelled checks enclosed covering the period, May, 1943, to February, 1951, inclusive, except for the period October 4, 1945, to May 10, 1946.

"With reference to the above account No. 1792, the following checks have been retained by the agents to be returned to Mr. Garrity at a subsequent date:

[676] *Check No.*	*Date*	*Amount*
151	December 22, 1950	$ 100.00
152	December 28, 1950	1,100.00
144	November 30, 1950	4,500.00
135	July 17, 1950	1,400.00
122	March 16, 1950	800.00
110	December 23, 1949	700.00
99	September 2, 1949	400.00
94	April 15, 1949	93.00
92	March 28, 1949	600.00
85	October 2, 1948	600.00
84	August 26, 1948	1,103.21
83	July 13, 1948	770.00
80	June 1, 1948	2,400.00
75	April 5, 1948	600.00
76	April 12, 1948	2,000.00
31	April 24, 1945	3,308.47

(Signed) W. Arthur Garrity, Jr.
Attorney."

The Court: I think we will pause here, and I am coming back in 15 minutes. I have another matter to take up.

[677] The Court: My emergency matter took longer than I thought it would. I am going to come back at two o'clock because I have an emergency matter I have to take up at 10 minutes to four today. I will come in at two and see if we can get along.

Q. Mr. Hurst, I intended to ask you, but I didn't are you here and have you been in attendance in court under a summons issued by the United States? A. Yes, I am.

Q. A simple summons? A. Yes.

Q. I think when we recessed, sir—had we completed what you remember of the happenings on the 16th of May, 1952? A. Yes.

Q. Did you attend a conference on the 20th of May, 1952, Mr. Hurst? A. Yes.

Q. At that time had you completed your report and forwarded it along the lines of organization in the Internal Revenue Service? A. Yes.

Q. Do you remember what happened or what transpired at that conference on May 20, 1952? Have you any present memory of it? A. I have a present memory. I would like to refresh it, though, with a memorandum that was prepared.

Q. I show you this document, sir, and ask you to examine it. [678] A. [Examining.]

Q. Have you examined it, sir? A. Yes.

Q. Does it refresh your memory? A. Yes.

Q. Was a conference held on May 20, 1952 in connection with the tax matters of Lieutenant Massei, sir? A. Yes.

Q. Can you tell us who was present at that conference? A. Mr. Garrity, Mr. Charles J. Isber and myself.

Q. Who is Mr. Isber? A. Mr. Isber was then in the Regional Counsel's office of the Treasury Department.

Q. Using that memorandum, sir, to refresh your recollection, can you tell what was said on that occasion during the conference?

Mr. Maguire: My same objection, of course.

The Court: That's right. Will you please, Mr. Koen, try to confine that within the orbit of my ruling in connection with its contents.

Q. May I have this for a moment, sir? A. [Handing.]

[Brief pause.]

The Court: Anything that constitutes a contention of counsel for Mr. Massei, please hesitate to speak of it until the [679] matter is gone into. I am disposed to exclude anything that represents a contention, an argument.

Mr. Koen: All right, sir.

Q. Mr. Hurst, having in mind the Court's pronounced directive, will you, using that memorandum to refresh your recollection, confine any testimony that you might give to statements that were made during the conference, excluding from it any references to court decisions or arguments or other contentious matters that might be included in that document? Do you understand what I mean, sir? A. Yes, sir.

Q. If you will, tell us. A. Mr. Garrity stated that Mr. Massei had been or was attached to a headquarters squad which was the equivalent of a vice squad from some time in 1932 until June of 1943 with some periods in there where he was off that squad for a short time.

Q. Let me interrupt you there— Go ahead, I'm sorry. A. And June 1, 1943 was the last date that Mr. Massei served on this vice squad; that he was a sergeant in charge of this vice squad during part of this period from 1932 to 1943; that he was in a position to obtain gifts or graft during this period. Mr. Garrity also stated that from June 1, 1943 forward Mr. Massei was doing personnel work, instructing policemen for the police department, and also doing licensing board duties and that Mr. Massei was retired from the police force at the end of 1950. [680] Mr. Garrity also stated, in response to a question from me, that the licensing board, that he did not believe that the licensing board duties of Mr. Massei encompassed anything to do with liquor. Mr. Garrity also emphasized that the then Attorney General—

The Court: Oh, no, no.

Q. No. That is one of those—.

The Court: No, no.

A. Mr. Garrity also stated—.

Q. Pardon me just a minute, please. A. Yes.

[Brief pause.]

The Court: The reference to Mr. Massei's—read that again. Will you please repeat what you said he told you about Mr. Massei's duties in connection with the so-called liquor, enforcement of the liquor law?

The Witness: That his licensing board duties did not encompass anything with respect to liquor licenses.

The Court: The jury may disregard that.

Q. Go on to the next page, if you will, please.

The Court: Just that latter part.

A. Mr. Garrity also stated that the taxpayer lived very frugally and was able to accumulate a great deal of money, even though prior to 1947, when Mr. Massei became a lieutenant, he had earned less than $3,000 per year. Mr. Garrity also stated [681] during prohibition Mr. Massei would receive a gift from every truck loaded with liquor that passed through the main street of Worcester.

Q. May I interrupt you there, sir? Was that the first time that you heard that statement from Mr. Garrity? A. I had—no, it was not.

Q. On how many prior occasions, if you remember, had you heard the statement of that sort from Mr. Garrity? A. I had heard similar statements on at least three occasions before.

Q. Now will you give us the substance of Mr. Garrity's statement on those occasions, as near as you can remember them sir? A. The substance of Mr. Garrity's statement—

Mr. Maguire: Your Honor please, may we have the occasion, who was present?

The Court: I think they have already been testified to, haven't they?

The Witness: No, your Honor, I testified on one occasion, January 24. I testified to one statement in Westerly at the safe deposit box.

The Court: That is the time the defendant was with you?

The Witness: Yes. But there were other statements as to which I can not place the date or the time.

Mr. Maguire: Your Honor please, I think we are [682] entitled to know when it was. He says three similar occasions, at least. We have had two of them. What is the third?

The Court: If he can approximate the time to the best of his recollection, and he knows it took place, the weight of it is for the jury. I will permit the testimony.

Q. In view of what counsel has said, Mr. Hurst, see if I understand you correctly. You testified to an occasion in the bank at Westerly, Rhode Island. A. With respect to this liquor truck statement, yes.

Q. You have also testified to a conversation on January 24. Now, in addition to those two occasions and excluding the date of the conference, how many other occasions was this matter of—

Mr. Maguire: Just give the number, Mr. Hurst. A. At least one.

Q. Now tell us what the substance—

Mr. Maguire: Your Honor, again I think we are entitled to know at least approximately when it was, who was there, the circumstances.

Mr. Koen: All right; I will withdraw the question.

The Court: That's right, you are entitled to—.

Q. Can you tell us the approximate date or the time, Mr. Hurst, when this third such conversation dealing with the

receipt of gifts from liquor trucks took place? A. It may have been—

Mr. Maguire: Not "It may have been".

[683] A. [Continued] I can not place the date exactly.

The Court: You don't have to. You approximate it. You just have in mind if you have any memorandum—

The Witness: In November or December, 1951.

Mr. Maguire: May we have where, your Honor, who was there—

Mr. Koen: Will you please, Mr. Maguire, let me conduct the examination?

The Court: That's right.

Q. Who was present, if there was anybody else in addition to yourself and Mr. Garrity, Mr. Hurst; do you remember? A. I don't recall the circumstances.

Q. Do you know where the discussion was held? A. In my office.

Q. In your office? A. Yes.

Q. Tell us, if you will, the conversation as near as you can remember it, or the substance of that conversation. A. The substance of the conversation was that Mr. Garrity went through Mr. Massei's police record as a police officer; that from 1921 until 1932—1923 until 1932, he was a motorcycle officer on Shrewsbury Street and that he received gifts or grafts from liquor trucks passing through Shrewsbury Street during that period.

Q. Now will you go back to that memorandum, sir, at the point [684] where I interrupted you and, using it to refresh your recollection, tell us what happened on that date and at that conference? A. I have already stated that Mr. Garrity stated that during the prohibition years when Mr. Massei was stationed on Shrewsbury Street that every truck loaded with liquor that passed through the main street of Worcester would make a gift to Mr. Massei.

Mr. Garrity also stated that the taxpayer believed these gifts were not income—

The Court: No, no; please.

The Witness: I'm sorry.

The Court: He stated what?

The Witness: That the taxpayer believed these gifts were not income.

The Court: How would a taxpayer know whether it was income or not? The jury may disregard that latter part, please, I beg of you.

A. [Continued] Mr. Garrity also stated at this conference that he had paid in, or Mr. Massei had paid in approximately the sum of $84,000 to the Collector of Internal Revenue and that he had cooperated to a very great extent and disclosed all his assets, and he also stated that the taxpayer's returns—is this all right?

The Court: I want you to be careful on contentions. That latter one was. Whatever his contention is as a lawyer—[685] you are a member of the bar.

The Witness: Yes.

The Court: I have admitted this evidence and I have made it perfectly clear that it is limited to the question of the authority of an agent to speak for this defendant. The ultimate question of that authority of the agent to make admissions binding upon the defendant, and I mean assuming that Mr. Garrity was acting as the agent, will be for the jury, under proper instructions as I will give you the instructions later on.

Mr. Maguire: Your Honor, will you hear me at the bench, please?

The Court: I have already covered that pretty well, Mr. Maguire, in every possible way, and I am going to give no further elaboration on that because I have carefully considered that statement and that is the statement I feel I should make and I make it so that no one can be prejudiced,

but you may come up; you have a right to come up to see me. The jury know that.

[Conference at the bench:

Mr. Maguire: Once again may it appear for the record that the defendant's position is that all of this conversation Mr. Hurst is relating and which Mr. Isber will relate were contentions advanced by the defendant's lawyer. They were not stated as admissions.

[686] The Court: When you came up here, that is at least the fourth or fifth time that statement has been asserted by you. You have a right to make it. If it isn't very clear, as you examine the record later on, I will permit you to cover the situation. If this Court felt all those matters were contentions, they wouldn't have been admitted. I say that without any prejudice of any kind, one way or the other, and of course I am saying it in the absence of the jury so they can't hear it. I mean without the hearing of the jury.]

The Court: If you hear a word or a syllable of anything that takes place up here, just put a finger to your ear and don't pay any attention. I don't think you have. Is your hearing all right now, Mr. Zuckerman?

Juror Zuckerman: Yes, sir.

Mr. Koen: The purpose, may it please the Court, and not for the purpose of leading this witness but having in mind your statements, if I may ask a question directed toward a particular subject which is incorporated in one of the paragraphs which you have indicated might be contentious:

Q. Was there some discussion, sir, about the annuity policies at that time? A. I believe there was, yes.

Q. Tell us who discussed the subject. [687] A. Mr. Garrity.

Q. Tell us what Mr. Garrity said on that subject. A. My only recollection of the discussion by Mr. Garrity on that

subject was that Mr. Massei could not have accumulated the money represented by these policies while he was on the personnel squad.

Q. Was there some further discussion—

The Court: Do you object to that?

Mr. Maguire: If your Honor please, our position is—

The Court: No, no; please. I know what your position is, Mr. Maguire. You have stated it six times—

Mr. Maguire: You have asked me a question, if your Honor please.

The Court: I asked if you objected and it calls for an answer, Yes or No. I am not going to have you state your objection in a manner that you have stated it up here. You have a right to state it up here and I have saved your rights, but I want it understood that any legal observations that are made in connection with any conversation or anything which constitutes an argument or a contention, I have excluded those which were harmful to the defendant. I have done it and I think that the United States Attorney—I will ask you to try to be careful to get this within the orbit of my ruling. For example, Mr. Maguire, if a member of the police department in a supervising capacity, the Chief of Police, in the light of [688] his knowledge and the type of service and the kind of work that a police officer did, if he gave an expert opinion it certainly would be the right of the United States Attorney to cross-examine him and ask him several questions. You get into an area where there would be a lot of controversy and where I feel that such a statement is a contention. If it is a part of the conversation where he said that his client told him, I will admit it because you want it, but an observation that is made. I am going to protect this defendant against those things and I am going to protect the government and see that we have a straight cut issue here, so far as I can go. I want you to feel that all your rights are saved.

[689] Q. Was there some other discussion, sir, with reference to annuities? A. I have no present memory of any further discussion on the annuities, Mr. Koen.

Q. Was there some discussion, sir,—will you read that memorandum and see if it refreshes your memory—on the matter of the purchase, the method by which the purchase of annuities was made?

Mr. Maguire: I think he has already answered that, your Honor.

The Court: Well, I don't know, Mr. Maguire. What he said was the money was turned over. You mean something else?

Mr. Koen: I'm asking a very simple question, may it please the Court.

The Court: All right.

Mr. Maguire: You wanted him to read the memorandum.

Mr. Koen: I don't want him to read the memorandum. I wish he would read it to himself and see if there is a portion there which refreshes his memory further than what he has now stated. He can answer that yes or no.

Mr. Maguire: He has already answered it, your Honor.

The Court: No, no, that's a perfectly fair question that the United States Attorney is asking, and I will let him examine it. Go ahead.

A. I have no present memory of anything else with respect to [690] annuities.

Q. Thank you, sir.

The Court: You mean you have exhausted your memory with reference to it; is that right, Mr. Hurst?

The Witness: Yes.

Q. And the reading of the document does not refresh it? A. That's right.

Mr. Koen: Again, may it please the Court, because of your position, if I may follow your phrase, within the orbit of your ruling, I would like to ask a question in this manner:

Q. Was there some further discussion which involved the estate— A. Yes, there was.

Q. —of Lieutenant Massei's father? A. Yes, there was.

Q. Will you tell us about that, please? A. Mr. Garrity stated that Mr. Massei had received a certain sum of money after the death of his father in 1949.

Q. Do you remember, sir, whether any specific amount of money was designated or named? A. No, I don't believe there was any specific amount named.

Q. All right. Well, what else was said on that subject, sir? A. My memory is that Mr. Garrity said that Mr. Massei's father had accumulated a large sum of cash with reference to liquor sales. That is my memory of what was said.

Q. Following that statement, sir, did you engage in the [691] conversation? A. Yes, I told Mr. Garrity that no inventory had been filed, and that Edward Massei, the taxpayer's brother, had informed us—

Q. Now wait a minute.

The Court: That you had talked to him.

The Witness: I had talked to Edward Massei.

The Court: Edward Massei is the brother that has testified, isn't he, Mr. Koen?

The Witness: Yes, your Honor.

Mr. Koen: Yes, your Honor.

The Court: He has already testified.

Q. Now, sir, directing your attention to the last sentence of the concluding paragraph of that memorandum, will you read that, sir, to yourself, first? [Witness peruses.] You have done so? A. Yes.

The Court: Would you come up?

[Conference at the bench, during which the following is recorded:—

The Court: Without disclosing the substance of the conversation, I am not stopping the United States

Attorney from asking if he told Mr. Garrity what he had found out in connection with what Mr. Garrity may have said if it is something that would not constitute a contention. You see, I don't know what this is.

[692] Mr. Koen: Well, I'll get it. [Produces memorandum.] You see, again, this is a portion of the concluding paragraph, and I will read the concluding sentence. There is a prior portion that deals with a discussion of circumstantial evidence and innocence and guilt, excluding hypotheses, all of which is, in view of your Honor's ruling, not proper.

The Court: That's right.

Mr. Koen: And would not, I believe, in any situation be admissible, but the soundness of which I am not asking your Honor to pass upon. This is the statement: "Mr. Garrity stated that the source of the income is gifts or graft, or bribes; that it was obtained before 1945; and that the taxpayer should not be prosecuted for tax frauds just because the taxpayer was a dishonest cop, and that it was not the province of the Treasury to police the morals of the taxpayer."

Now I think that last portion of that—

The Court: I think it would be highly prejudicial.

Mr. Koen: That is why I am proceeding with caution.

The Court: For example, suppose a prosecutor—

[693] Mr. Koen: No, let me see if I can iron it out.

The Court: Suppose a prosecutor argued to a jury that was so, I would have to declare a mistrial because it is argument.

Mr. Koen: I agree to it. I concede that.

Mr. Maguire: May it appear in the record the defendant has no objection to all of it going in?

Mr. Koen: All I want from this witness is a state-

ment from him to the effect that Mr. Garrity at that time stated the source of income was gifts, graft, or bribes, and the rest of that I think is certainly contention.

Mr. Maguire: Then it is taken out of context.

The Court: I'll admit the whole thing. You don't object to it?

Mr. Maguire: No.

The Court: All right. I am going to allow him to argue it, anyway, and I will allow you to argue the other way.

The Court: I am admitting this, Mr. Maguire, on the basis of the fact if I allow one part of a sentence, I am going [694] to allow the other part to go in, too. My personal opinion is that it is better to leave it out, but you want it in. It's something which I'll permit you to argue anyway, and I am going to permit the Government to argue the other way. I am not going to pass on the question. Let's go ahead.

Mr. Maguire: Of course, if your Honor please, we don't know yet what the witness is going to testify to. We know what is in the memorandum, but we don't know what his memory is.

The Court: No, but I think we have a pretty good idea.

Mr. Koen: May it appear on the record, sir, that at the bench conference I stated to you I merely wanted the first portion?

The Court: That's right, that's right. It has already appeared in the record that Mr. Maguire wants that in and—

Mr. Maguire: May it appear again, your Honor, I want it all in.

The Court: Oh, now, please! Now wait a minute. I've already told you— Please, now, wait a minute, Mr. Maguire. I want this trial to continue on the high level that

it has been. I have brought you up here. I'm the Judge. I've made my rulings. If I'm wrong, there's a place to correct me. That's the way it always should be. It shouldn't be other than that. I wouldn't want it other than that. But the reasons given, you're very anxious to give those reasons; you argued yesterday [695] to have the reasons given in the presence of the jury, and the reasons given in the presence of the jury were reasons that would violate the sanctity of what I consider to be the boundary lines, and I say this in a spirit of kindliness,—the sanctity of the boundary lines which would determine the admissibility,—propriety, rather, or the non-propriety of the testimony. Mr. Koen is going to use a part of this, and you feel the other part of it should go in. I am going to tell the jury, I am going to instruct the jury, that it is going in only because you want it. The first part of it I will let go in, the weight of it being for the jury; the second part you want because it is the second part of the sentence as it was read there, and the witness himself—

Did you prepare this memorandum yourself, Mr. Hurst, to refresh your recollection?

The Witness: I did not, your Honor.

The Court: It wasn't prepared by you, then?

The Witness: No, sir.

The Court: But does it in fact refresh your recollection?

The Witness: Yes.

The Court: With reference to everything?

The Witness: Not everything, your Honor.

The Court: No, I mean—

The Witness: Those things I testified to.

The Court: No, I mean in the paragraph, whatever is [696] there, there was a continuity to it so that one followed the other. Would you point it out to him, Mr. Koen.

Q. The concluding sentence from the last paragraph.

Mr. Maguire: Will you ask a question, Mr. Koen.

Mr. Koen: The Court just asked me to do something else, Mr. Maguire.

The Court: Yes, I asked him to read it. I asked him if that represented a continuity of thought as he talked with Mr. Garrity allegedly on that day. I have asked him to read it and tell me whether it is or not.

The Witness: Yes, it is.

The Court: All right, go ahead.

Q. You have examined it, sir, and does that refresh your recollection? A. Yes.

Q. What, sir, having used that to refresh your recollection, is your memory of what happened on that day? A. Mr. Garrity stated that the source of Mr. Massei's income was gifts, graft, or bribes; that it was obtained before 1945— Shall I continue?

The Court: He wants the rest of it, so go ahead.

Mr. Maguire: He doesn't want the rest of the sentence, if your Honor please, I think he wants the rest of all that was said.

[697] The Witness: Yes, that is what was said. And that the taxpayer should not be prosecuted for tax fraud just because the taxpayer was a dishonest cop—

Mr. Maguire: Are you reading now?

The Witness: I remember this was said, Mr. Maguire.

The Court: No, if you object to that, Mr. Maguire, I am going to exclude it. I am only letting it in because you say you want it in because it is a part of a general sentence. I am going to instruct the jury very carefully on that at the proper time.

A. [Continued] That the taxpayer should not be prosecuted for tax fraud just because the taxpayer was a dishonest cop, and it was not the province of the Treasury Department to police the morals of a taxpayer.

Mr. Koen: Pardon me just a moment, sir.

The Court: Now, I want you to receive that as a statement. I will carefully instruct you on the law as to that. I will carefully instruct you on the yardstick you are going to use to determine whether or not there was an agency relationship in which Mr. Garrity made certain statements that are binding upon the defendant. All comments and all arguments and all contentions are going to be disregarded as having any probative force, except in so far as circumstances might serve as a yardstick by which to help you in making a determination as to the true value of this testimony, based upon another yardstick that I will give you for judgment at a proper time. So that's why I [698] am so anxious to have you keep your minds wide open.

Mr. Koen: May it please the Court, I have reached a point so far as Mr. Hurst's evidence is concerned, where I will break off with the discussions and go on to his computation of net worth and so forth, and I think it might be advisable to resume that aspect at 2 o'clock.

The Court: I think that is an excellent idea. It will give you a little extra jump on the others, five minutes' start.

Mr. Maguire: If your Honor please, may I have an opportunity during the noon recess to examine the memorandum which he used?

The Court: No, I'm not going to permit that memorandum to be used except when it is used in the court room during the trial by either Mr. Koen or yourself, because—well, I'm just not going to. You know what my idea is about that. I made it perfectly clear this morning why you have a right to look at it in the presence of the jury, to your heart's content, Mr. Maguire.

Mr. Maguire: I thought it might save time, your Honor.

The Court: No, I know. Sometimes a stitch in time saves nine, but sometimes saving time doesn't save time. That's a passing observation. I think the better rule is

to have those memos used at the proper time. They can be used at the proper time in the cross examination. And I very frankly would tell you this, Mr. Maguire. I have no objection to you reading that [699] if Mr. DiMento or Mr. Koen is there.

Mr. Maguire: Could I do that?

Mr. Koen: I think you have already read it, sir?

Mr. Maguire: I have read only a part of it and I was not able to read the rest of it and I would like to.

Mr. Koen: I will give you a chance to read anything you want to read. [Balance of statement not heard.]

The Court: Mr. Maguire, before the jury came in this morning, I made the ruling up here and it is a part of the record in connection with these memos which were offered for identification yesterday. A memorandum that refreshes a witness' recollection is a little bit different, and it's a memorandum that's in the possession of the Government, and at the proper time you will have free access to it with full opportunity to look it over, and if you need 5 minutes' recess, you may have it. I am still interfering with your right to go along. Let's go along here.

[Recess from 12:55 p.m. to 2:00 p.m.]

[700] AFTERNOON SESSION

HAROLD HURST, Resumed

Direct Examination by Mr. Koen, Continued

Q. Now, Mr. Hurst, based on the survey that you made and the investigation you made on the information that was delivered to you by Mr. Garrity, attorney for Lieutenant Massei, did there come a time when you made an estimate of the net worth of Mr. Massei as of December 31, 1945?

A. That time came.

Q. And can you tell us, sir, the types of assets which you

considered in arriving at the net worth? A. As of December 31, 1945?

Q. As of December 31, 1945, that is right. A. Cash in banks, United States Savings Bonds, paid-up annuities, automobiles.

Mr. Koen: Now, if there is no objection, may it please the Court, we have put on the board a chart showing not only the assets, but all the other factors which figure in the net worth as of December 31, 1945, and the various computations through the prosecution years. May we have that now?

Mr. Maguire: I am sure there is no objection, but I wonder if I might have a quick look at it, your Honor?

Mr. Koen: Of course.

The Court: Certainly, and you need not confine yourself to a quick look. Take a good look at it. I certainly will [701] never hurry anybody when they ought to have their day in court.

Mr. Maguire: [After examining blackboard.] No objection, your Honor.

The Court: Now, I would like to have that placed where it can be in full view of the jury, because I am prepared to say now that I am not disposed to have this go up to the jury room at the present time. I don't like to send the boards up. So that that is why I am very anxious to have the jury see it. Where would the best place be? It seems to be in the shadow now.

[The blackboard is placed to the satisfaction of the jury.]

Q. As of December 31, 1945, Mr. Hurst, the first item in the list of assets, entitled "Cash in banks", what was the cash in banks as of that day? A. $16,006.32.

Q. Can you help us as to the banks, sir? A. I can give you the balance in each bank.

Q. Will you, please. A. Worcester Five Cent Savings

Bank, $2006.67; Worcester Federal Savings and Loan Association, Account No. 23352, $162.26; Worcester Federal Savings and Loan Association, Account No. 23753, $344.75; Worcester Mechanics Savings Bank, $3362.48; Worcester County Institution for Savings, $7074.57; Peoples Savings Bank, $2687.33; Worcester County Trust Company, checking account, $368.26.

Q. And the total of those is what appears on the board? [702] A. Yes, the total is $16,006.32.

Q. The next asset which you considered in arriving at the net worth of Lieutenant Massei on that day was what? A. United States Savings Bonds.

Q. And did your investigation and survey indicate whether or not he held any securities at that time? A. My investigation showed he held no securities as of that date.

Q. All right, with reference to United States Savings Bonds—counsel for the defendant and I agree, Mr. Hurst—and with the permission of the Court—that these items through the six years which are recited on the board may be testified to, in the amounts which the witness will describe.

Mr. Koen: Is that correct, Mr. Maguire?

Mr. Maguire: That is correct.

The Court: So that there will be no need to particularize them; is that what you mean?

Mr. Koen: Yes, sir.

The Court: All right, that is by agreement of counsel.

Mr. Maguire: That is by agreement of counsel.

The Court: All right.

Q. Now, the item of United States Savings Bonds as of December 31, 1945? A. There was a total of $16,706.25, at cost.

[703] Q. Loans receivable, sir, did you consider that type of asset in arriving at the net worth of Lieutenant Massei? A. Yes, I did.

Q. Were there any loans receivable as of December 31, 1945? A. I was unable to find any.

Q. Will you, in layman's language, give the jury a definition of loans receivable? A. It is money received by reason of the fact that you have monies that are owed you by reason of the fact that you lent those monies to somebody.

Q. The next item is what type of asset which you considered? A. Paid up annuities.

Q. And what was the value of paid up annuities as of December 31, 1945? A. $27,668.16, at cost.

Q. Did you consider real estate as an asset as of December 31, 1945? A. I did.

Q. What holdings of real estate did you find as of December 31, 1945? A. I found none.

Q. The next item or type of assets which you considered was what, sir? A. Automobiles.

[704] Q. And what did you allow for that, sir? A. I allowed $700 as the cost or value of automobiles as of December 31, 1945.

Q. Now, you have another item entitled furnishings, sir. How did that figure in your assets as of December 31, 1945? A. I used a value of zero, for lack of any other information on furnishings.

Q. And the total net worth as of December 31, 1945 of all of the assets which you found as a result of your survey and investigation and information furnished to you by the defendant or his counsel was what? A. $61,080.73.

Q. What were the, if there were any, the liabilities outstanding as of December 31, 1945? A. I found none.

Q. And what, then, sir, was the net worth of Lieutenant Massei as of December 31, 1945? A. $61,080.73.

Q. Now, sir, directing your attention to December 31, 1946, what was the cash on hand as of that date in banks? A. $14,870.42.

Q. Compared with December 31, 1945, there was a reduction? A. Yes.

Q. Were the same banks embraced in your computation as of December 31, 1946? [705] A. Yes, the same bank accounts.

Q. That were embraced in your computation as of December 31, 1945? A. Yes, the same bank accounts.

Q. Going to the next category, as of December 31, 1946, sir, securities, did you find, as of December 31, 1946, securities? A. Yes, I found 50 shares of Higgins, Inc. at a cost of $550.

Q. United States Savings Bonds? A. I found the same figure as in 1945, $16,706.25.

Q. And the next item? A. There were no loans receivable as of the end of 1946.

Q. And as of the end of December, 1946, the next item, annuities. A. There was a total cost of $53,880.56 as of the end of that year.

Q. The next asset? A. The next asset was the property in West Harwich in the amount of $1,125 as of the end of 1946.

Q. And the next item, automoblies, as of December 31, 1946? A. That represented the cost of a new Dodge in 1946 for $1,213.88.

Q. And the amount under the classification of furnishings as of December 31, 1946? A. Again, zero.

Q. Now, the total of his assets as of December 31, 1946 was [706] what? A. $88,346.11.

Q. Did you determine whether or not as of that date there were any liabilities outstanding? A. I was unable to find any liabilities as of that date.

Q. What was the net worth, as you computed, of Lieutenant Massei as of December 31, 1946? A. $88,346.11.

Q. Having in mind, sir, the net worth as of December 31, 1945 was $61,080.73, what for the calendar year 1946 was

the net worth of Lieutenant Massei, during that year? A. You mean the increase?

Q. The increase. A. The increase in net worth as of the end of 1946 over the end of 1945 was $27,265.38.

Q. Now, sir, were certain allowances made for living expenses during that calendar year by you? A. Yes.

Q. And how much, sir, was allowed during that year for living expenses? A. We added $1,313.40.

Q. Will you tell the Court and jury how you arrived at that figure for the living expenses during the calendar year 1946? A. Through information largely furnished by defendant's counsel.

Q. There appears on the board, the next item, federal taxes paid; [707] correct? A. Yes.

Q. And the amount, please? A. $1,079.95.

Q. And from where were those figures obtained? A. Those were taken from tax information filed by Mr. and Mrs. Massei.

Q. And the total of those items, sir, the increase in net worth, the living expenses and the federal taxes paid? A. $29,658.73.

Q. During the calendar year 1946, sir, did you find any adjustments necessary due to capital gains? A. No.

Q. What, sir, on the figures you have given to us for the calendar year 1946, was the correct gross income of Lieutenant Massei? A. $29,658.73.

Q. And what, sir, was the gross income reported by Lieutenant Massei for the calendar year 1946? A. $3,232.62.

Q. You have the next item entitled unaccounted for gross income. What is that, sir? A. $26,426.11.

Q. Going to the calendar year of 1947, as of December 31, 1947, as to the asset, cash in banks, what was that figure as of [708] December 31, 1947? A. $10,839.55.

Q. And does that embrace the same accounts, sir, which

were considered during the calendar year 1946? A. Same accounts plus one other account.

Q. And what, sir, was the one other account? A. The Worcester Police Credit Union account.

Q. The next item, sir, securities, at the end of the calendar year 1947? A. I found that the taxpayers had $14,228.45 in securities.

Q. As compared with what for the prior year, sir? A. $550.

Q. The amount of United States Savings Bonds on hand on December 31, 1947 was what? A. The same amount as before, $16,706.25.

Q. By comparison with the prior year, that remained unchanged? A. Yes.

Q. Did you find any loans receivable or any evidence of loans receivable during the calendar year 1947? A. I did not.

Q. With respect to annuities, sir, what was the value of those as of December 31, 1947? A. Cost was $53,880.56.

[709] Q. And that figure is by comparison with the figure at the end of December 31, 1946, what, sir? A. The same.

Q. The next type of asset, Real Estate. What was the value of that as of December 31, 1947? A. $2725.

Q. And the same item at the end of December, 1946, is what? A. $1125.

Q. Automobiles as of December 31, 1947? A. $1213.88.

Q. And the value as of December 31, 1946, of that item was what? A. The same amount, $1213.88.

Q. And the item of Furnishings, as of December 31, 1947, was still nothing? A. Zero.

Q. And the total assets, Mr. Hurst, that Lieutenant Massei had on December 31, 1947, were what? A. $99,593.69.

Q. During the calendar year 1947, directing your attention to the question of Liabilities, were there any liabilities

found? A. There was a passbook loan as of that date in the amount of $1255.94.

Q. The difference between the total assets and the loan payable is what? [710] A. $98,337.75.

Q. That amount is what? A. That is the net worth at the end of 1947.

Q. All right, sir. With the net worth at $98,337.75 on December 31, 1947, and the net worth as of December 31, 1946, in the amount of $88,346.11, what was the increase in the net worth of Lieutenant Massei during the calendar year 1947? A. $9,991.64.

Q. Now did you allow certain living expenses to the Lieutenant during that year? A. Yes.

Q. In what amount, sir? A. $1288.40.

Q. And on what, sir, did you predicate that allowance? A. On information furnished by Mr. Garrity, with one exception of $20.

Q. That one exception was what? A. $20 in gifts by check.

Q. What was the amount of Federal taxes paid by Lieutenant Massei for that calendar year? A. $303.70.

Q. Now, sir, adding the increase in net worth and the living expenses and the amount paid for Federal taxes, what was the total of those three figures, sir? A. $11,583.74. [711] Q. Did your investigation or your survey, sir, reveal during the calendar year 1947 any adjustment due to the Lieutenant because of capital gains? A. No.

Q. On the basis of the figures which you have just given to us, sir, what was the corrected gross income of the Lieutenant during the calendar year 1947? A. $11,583.74.

Q. What was the gross income reported? A. $3,539.66.

Q. Can you tell us what the gross income unaccounted for was for the year 1947? A. $8,044.08.

Q. Now directing your attention to the calendar year 1948, sir, as of December 31st, taking the first item, Cash

in Banks? A. Total amount as of December 31, 1948, was $3,699.20.

Q. And compared with the previous year ending December 23, 1947, sir, was that a lesser amount than the prior year? A. Yes.

Q. And the approximate difference? A. That is $7000, $7100.

Q. All right. Directing your attention to Securities, the amount of securiites which you found on December 31, 1948? A. $18,315.24.

Q. With relation to the security holdings at the end of December 31, 1947, sir, was there an increase or decrease? [712] A. Increase.

Q. And the approximate amount? A. $4100.

Q. With reference to United States Savings Bonds, as of December 31, 1948, the amount, sir? A. The total amount was $14,906.27.

Q. And with reference to the amount shown on hand as of December 31, 1947, does that represent an increase or decrease? A. Decrease.

Q. And the approximate amount, sir? A. The decrease was about $1800.

Q. Did you find at the end of December 31, 1948, any evidence of loans receivable, sir? A. No, sir, I did not.

Q. And the matter of Annuities, as of December 31, 1948, what was the value? A. $53,880.56 cost.

Q. With reference to the cost of that as of December 31, 1947, was that the same amount? A. Same amount.

Q. All right. Directing your attention to real estate as of the end of December 31, 1948? A. $15,655.84.

Q. Directing your attention to real estate holdings as of December 31, 1947, sir, does that represent an increase or [713] decrease? A. Increase.

Q. And the increased amount, sir? A. Almost $13,000.

Q. Have you available there, sir, for quick reference, the

items that went into that figure of $15,655.84? A. Yes, I do.

Q. Will you tell us how that figure was arrived at? A. That was arrived at by $1600 in land bought from Edward F. and Lucy Comerford on Shore Road in Westerly; $1200 in land representing three lots on Shore Road, Westerly, or near Shore Road, Westerly, bought from Dominic and Rose Pingatore; $1,000 in land bought from Carrie and Albert Saunders on Kimball Avenue in Westerly; $9,966.25 expended on construction of a house at 59 Shore Road, Westerly, paid to Samuel Urso; $1125 paid to the heirs of Benjamin F. Baker for land in West Harwich, Massachusetts; and $8056.87 paid to Joseph Urso for house plumbing in Westerly.

Q. Now the next item which appears on the schedule is, as of December 31, 1948, sir, what? A. Which one?

Q. The next item which appears on the net worth schedule is entitled "Automobiles"? A. Yes.

Q. As of December 31, 1948, sir, tell us the figure. A. $1,613.88.

[714] Q. And the next item of Furnishings, sir? A. $800.

Q. And the figure which was charged to that item on the previous year was what? A. Zero.

Q. Now can you tell us how the item of $800 for Furnishings was arrived at, sir? A. That was provided by Mr. Garrity as the value or the cost of furniture bought for the new house in Westerly.

Q. Now the total assets, sir, as of December 31, 1948, of Lieutenant Massei were what? A. $108,870.97.

Q. As of December 31, 1948, were there any liabilities outstanding, sir? A. Yes, there were.

Q. And the amount, if you will? A. $5,000.

Q. Does the liability of $5,000 which you say was outstanding on December 31, 1948, embrace a liability of $1255.94 which was outstanding as of December 31, 1947? A. No, that is a separate item.

Q. What happened, sir, to that liability of $1215.94? A. That was paid off automatically by the bank immediately after the turn of the year.

Q. Liability of $5,000 then outstanding as of December 31, 1948, was what, sir? [715] A. It was the amount borrowed on a note from the Worcester County Trust Company, collateral loan.

Q. Tell us the net worth, sir, of Lieutenant Massei as of December 31, 1948. A. $103,870.97.

Q. And what was his net worth as of the end of December 31, 1947? A. $98,337.75.

Q. The increase in net worth for the calendar year 1948 of Lieutenant Massei was what? A. $5,533.22.

Q. Now, sir, were certain living expenses allowed for the calendar year 1948? A. Yes.

Q. And the amounts of those? A. $1895.53.

Q. On what was that amount based? A. Principally on information furnished by Mr. Garrity.

Q. Sir, do you know the amount of Federal taxes that were paid on the calendar year 1948? A. $478.50.

Q. And the total of those last three items—the increase in net worth, the living expenses and Federal taxes paid? A. $7,907.24.

Q. Did you find during that calendar year that the lieutenant [716] was entitled to any adjustment because of capital gains? A. No.

Q. What, sir, was the corrected gross income of Lieutenant Massei for the calendar year 1948? A. $7,967.24.

Q. What was the gross income which was reported? A. $4,549.28.

Q. Tell us, if you will, the unaccounted for gross income for that year. A. $3,357.96.

Q. Now directing your attention, sir, December 31, 1949, what, sir, did your examination reveal of the amount of cash in banks as of that date? A. $6,640.39.

Q. With relation to the amount of cash in banks as of the end of the previous year, does that represent an increase, sir, or a decrease, sir? A. Increase.

Q. And the approximate amount? A. A little under $3,000.

Q. The Security item of assets, sir, what did you find as of December 31, 1949? A. $41,711.91.

Q. With relation to the same category as of 1948, sir? A. It was increased.

[717] Q. Approximately how much? A. About $3400.

Q. Savings Bonds as of December 31, 1949, were how much? A. $14,903. 25.

Q. The same amount which was credited as of December 31, 1948? A. Yes.

Q. Did you find during the year 1949 any loans receivable, sir? A. No, I did not.

Q. All right. And the amount of the Annuities outstanding as of December 31, 1949? A. $53,880.56.

Q. And whether or not that was the same amount as of December, 1948? A. Yes.

Q. And the subject of Real Estate as of December 31, 1949? A. $18,304.55.

Q. And with reference to the same item as the previous year, is that an increase or decrease? A. It is an increase.

Q. And the approximate amount? A. $2700.

Q. Will you tell us the items involved in that increase, sir? A. Yes. There was a lot of land on Franklin Avenue in Westerly bought from Carrie and Albert Saunders for $400; there was land bought from Allan O. and Margaret E. Whitford on Shore [718] Road, Westerly, in the amount of $800; there was $1445 spent for a heating system paid to Barbone Service Company in Westerly. That represents the increase. May I go back?

[719] Q. Yes, sir. A. There was one error. Instead of $856.87 being extended to Joseph Urso for plumbing, it

should be $764.59, in 1948, but the total is correct, $15,655.84.

Q. As of December 31, 1949, sir, on the item of automobiles. A. I have total cost of $2 227.03.

Q. And as compared with that item at the end of the prior year? A. There was an increase of about $600.

Q. And the allowance for furnishings as of the end of December, 1949? A. The same figure of $800 was used.

Q. Now, the total of the assets as of December 31, 1949 was what, sir? A. $118,470.69.

Q. The liabilities outstanding? A. Still $5,000.

Q. Was that the same $5,000 obligation that was outstanding as of December 31, 1948? A. The same obligation except the note may have been renewed.

Q. The net worth as of December 31, 1949 was what, sir? A. $113,470.69.

Q. With the net worth of the prior year being in the amount of $103,870.97, sir, what was the increase in the net worth of Lieutenant Massei during the calendar year 1949? A. $9,599.72.

[720] Q. Did you allow living expenses, sir, during that calendar year to the lieutenant? A. I added living expenses.

Q. And the amount, sir? A. $2007.64.

Q. On what was that figure based? A. Information furnished by Mr. Garrity, substantially.

Q. Tell us, if you will, the amount of the federal taxes paid during that year. A. $520.40.

Q. And the total of the increase in net worth, the living expenses and federal taxes, was what? A. $12,127.76.

Q. Did you find, during that year, sir, that Lieutenant Massei was entitled to anything due to capital gains? A. No.

Q. What, sir, was the corrected gross income of Lieutenant Massei for that year of 1949? A. $12,127.76.

Q. Now, sir, referring to the chart for the purpose of this question and explaining this matter to the jury, will you step down here and explain the difference in the levels which

appear on this chart, before I ask the next series of questions? A. [At the blackboard] In the years 1946, 1947 and 1948 the taxpayer has used the tax table. The only figure that appeared [721] on the tax returns in those years were gross income. Gross income reported. In the years 1949 and 1950 the net income figures appeared on the tax returns so that we have compared net income directly from the net income reported, rather than the gross income corrected and gross income reported.

Q. From the gross income as corrected of $12,127.76, did you make a deduction, sir? A. Yes.

Q. And the amount of the deduction? A. $1,000 for statutory standard deduction.

Q. And that is entitled, on the board at least, net income corrected? A. After the $1,000.

Q. After the deduction, the balance is what? A. $11,127.76.

Q. And that is the net income corrected? A. Yes.

Q. Now, sir, what was the amount of the net income, as reported? A. $4,504.42.

Q. And the difference between the net income as corrected and the net income reported was what? A. $6,623.34.

Q. And that sum represents—? A. Unaccounted for net income.

[722] Q. Unaccounted for net income during the calendar year 1949. Now, going to the calendar year ending December 31, 1950, sir, cash in banks as of that date. A. $7,175.25.

Q. By comparison with the same item at the end of the previous calendar year, was there an increase or decrease? A. Increase of about $535.

Q. And the item of securities as of December 31, 1950, sir, the amount? A. $22,312.56.

Q. By comparison with the same item at the end of the previous year, was there an increase or a decrease? A. An increase.

Q. As of December 31, 1950, sir, the matter of savings bonds, the amount? A. $14,456.25.

Q. Does that represent an increase or a decrease in comparison with the prior year? A. Decrease.

Q. And the approximate amount? A. $450.

Q. Now, sir, did you find any evidence of loans receivable at the end of the calendar year 1950? A. Yes, there was a loan receivable outstanding as of December 31, 1950 in the amount of $4,500 due from Edward H. [723] Massei.

Q. That is the defendant's brother? A. Yes.

Q. Now, as to annuities at the end of the calendar year 1950, what did you allow in the net worth schedule? A. The cost of all annuities as of the end of 1950 was $83,828.36.

Q. By comparison with the figure outstanding as of December 31, 1949, sir, is that an increase? A. An increase of about $30,000.

Q. The matter of real estate as of December 31, 1950? A. $18,304.55.

Q. And that is the same figure that was outstanding as of December 31, 1949? A. Same figure.

Q. The matter of automobiles as of December 31, 1950? A. $3,727.03.

Q. By comparison with the same item outstanding as of December 31, 1949, sir, an increase or decrease? A. Increase of $1,500. There were two cars instead of one.

Q. As of December 31, 1950, furnishings? A. The same figure was used of $800.

Q. All right, sir. The total assets of Lieutenant Massei as of December 31, 1950 was what, sir? A. $155,104.

[724] Q. The liabilities outstanding as of December 31, 1950? A. There was a $5,000 note due the Worcester County Trust Company and a $600 loan due the Worcester Police Credit Union making a total of $5,600 in liabilities.

Q. Now, the net worth of Lieutenant Massei as of December 31, 1950 was what, sir? A. $149,504.

Q. Having in mind that his net worth at the end of December 31, 1949 was $113,470.69, sir, what was his increase in net worth for the calendar year 1950? A. $36,033.31.

Q. On the matter of living expenses, sir, what did you give to the Lieutenant for that year? A. $2,046.50.

Q. Based on what? A. Substantially Mr. Garrity's figures.

Q. All right, sir. The federal taxes paid during that year? A. $688.82.

Q. Now, sir, the total of his increase in net worth for living expenses and federal taxes paid was what? A. $38,768.63.

Q. Now, did you, during the calendar year 1950, find that Lieutenant Massei was entitled to some adjustments due to capital gains? A. Yes.

[725] Q. And the amount, sir? A. $569.24.

Q. Can you explain to the Court and jury how you arrived at that figure? A. By the tax return. He had taken in only 50 per cent by reason of a long term capital gain and we gave him the benefit of the additional 50 per cent.

Q. Now, the gross income as corrected, sir, was what? A. $38,199.39.

Q. Allowing for the standard deduction of $1,000, sir, what was the corrected net income? A. $37,199.39.

Q. The reported net income, sir? A. $6,031.57.

Q. The difference in dollars and cents? A. $31,167.82.

Q. And what is that figure, sir? A. The unaccounted for net income in 1950.

Mr. Koen: May we have a recess here, sir?

The Court: Oh, yes.

Mr. Koen: I noticed one of the jurors is yawning.

The Court: Are you sure that you are not the one? I will recess for 10 minutes.

[Brief recess.]

The Court: I would like to say to you, Mr. Foreman

[726] and Ladies and Gentlemen of the Jury, this delay was due to the fact that Mr. Koen had an emergency call of an official nature and was obliged to go downstairs. The United States Attorney had sent for him on a matter entirely foreign to this. That is a fair statement, isn't it?

Mr. Koen: Yes, sir, and thank you for your courtesy.

Q. Mr. Hurst, as a result of your investigation and examination and analysis of the documents based on the information which you discovered, did you find that the defendant expended substantial amounts of money which you were unable to trace to bank accounts or sales of other assets during the five-year period, during the calendar years 1946 to 1950 inclusive?

Mr. Maguire: If your Honor please, it seems to me Mr. Koen is starting to argue his case.

The Court: Let me suggest, Mr. Maguire—I will have the question reread. I know he is not going to argue.

Mr. Maguire: I think we both are apt to try, your Honor.

The Court: No, you are not. I know neither one of you will do it because I know you are conscious of the fact that I will apply the stop, look and listen rule very nicely.

[Discussion off the record.]

[The question is read.]

Mr. Maguire: Now that I have heard it again, it seems to me there are half a dozen questions there, your Honor.

[727] The Court: As a matter of fact, Mr. Maguire, I can understand this question. This witness is qualified as a certified public accountant, apart from the fact that he is a lawyer, and he has had experience covering some years in the Internal Revenue Service and you prepared this chart, didn't you? It was prepared under your direction?

The Witness: Yes, it was.

The Court: And in the light of his qualifications, as I can recall the questions that Mr. Koen asked, he probably

must have had this in mind. Did you, Mr. Koen?

Mr. Koen: I did, sir.

The Court: I will declare the witness an expert, but let me say this to you: When I do this, just like a doctor or anybody else, as I am going to say to you frequently, God willing, he is just another witness. The weight of it is for you. You will have full opportunity to cross-examine.

Mr. Maguire: May I object to his being qualified as an expert on these subjects of which Mr. Koen inquired? That is for the jury and I don't think they need help.

The Court: The responsibility is within the orbit of a judge's discretion. I have made that preliminary determination on the basis of what he said his qualifications were and on the basis of the fact that his work which certainly is associated with the work of a certified public accountant and he was an accountant long before he was certified.

[728] Mr. Maguire: If he is going to make the tax computation, your Honor, I have no objection.

Mr. Koen: He is not going to make the tax computation.

The Court: I will permit the question and you will have full opportunity to cross-examine.

Mr. Maguire: Save my rights, please.

The Court: Oh, certainly. All right.

Q. Will you answer that question, sir? A. Yes, I found a number of items where I was unable to trace the purchase to a check or to a savings bank withdrawal or to any other source. In the year 1946 there was $26,212.40 expended for a paid-up annuity policy. I was unable to find any check for that. There was also $100 expended in connection with the deposit for the purchase of a lot in West Harwich. There was also $931.88 out of a total of $1,213.88 expended for the purchase of a new Dodge on April 18, 1946. The $931.88 was by cash.

In 1947, in connection with the purchase of 10 shares of

American Tel. & Tel. stock, $345.62 was expended by cash. 1947, in connection with the purchase of land in Westerly, Rhode Island from Edward Comerford, Jr., $1,600 was expended in cash. I was unable to find any check.

In 1948, in connection with the purchase of 25 shares of United Aircraft stock, $714.35 expended in cash. Also in 1948, in connection with the purchase of 100 shares of New [729] England Electric System, there was $1,140.90 expended in cash. 1948, in connection with construction of a house at 59 Shore Dfive in Westerly, of the payments to Samuel Urso, the contractor, $4,966.25 was in cash. 1948, in connection with the purchase of land in Westerly, Rhode Island from Domenic and Rose Pingatore $1,200 was in cash. 1948, in connection with the purchase of a lot of land from Carrie and Albert Saunders, $400 was in cash. In connection with the purchase of an automobile in 1948 from the George Motors Company, $400 was in cash. In connection with the purchase of furnishings for the house in Westerly, Rhode Island, $800 was in cash. We were unable to find any checks.

1949, in connection with securities transactions involving purchase of 25 shares of Schenley Industries, 25 shares of Bond Stores and 25 shares of Pure Oil stock, $1,680.36 of the total amount of that transaction was in cash. 1949, again, in connection with the purchase of 25 shares of Howard Store stock and 10 American Tel. & Tel. shares, $1,725.92 was in cash. In 1949, in connection with the purchase of a lot from Marguerite Whitford, there was $800 expended in cash. In 1949, in connection with the installation of a heating system at the house at 59 Shore Drive, Westerly, $1,445 was expended in cash, payable to Victor Barbone.

In 1950, in connection with the purchase of a paid-up annuity from the John Hancock Mutual Life Insurance Company, [730] $29,947.80 was expended in cash. 1950, in

connection with the purchase of a new Dodge from the George Motor Company, $600 was expended in cash. In 1950, in connection with the purchase of a 1946 used Ford from Heywood Brunmark Motor Company in Worcester, the $100 deposit was in cash. We were unable to find any check.

Q. Is that all, sir? A. Yes, sir.

Q. Now, for the purpose of recapitulation, what, sir, was the net worth of Lieutenant Massei as of December 31, 1950? A. The net worth of Lieutenant Massei and Mrs. Massei as of December 31, 1950 was $149,504.

Q. And the net worth as of December 31, 1945 was what, sir? A. $61,080.73.

Q. Will you tell us, for the five-year period between December 31, 1945 and December 31, 1950, the total increase in net worth?

Mr. Maguire: If your Honor please, I have no objection to this if you will instruct the jury that this goes on a year-to-year basis and you don't take it in a five-year span.

The Court: I will cover all these matters in my instructions to the jury and on the requests you make at the time. I think it is better, in the light of these complexities, for me to refrain from charging on the law until all the evidence is finished, and I have already asked the jury to [731] try to remember factual circumstances, and certainly, to come to no conclusion. I have done my best to have them do that and I really want them to do it, so please don't form any conclusion with reference to that which would constitute a basis for a verdict later on. Just keep that in mind. Try to remember them. Go ahead, Mr. Koen. You may have the answer.

[The question is read.]

A. $88,423.27

Mr. Koen: Pardon me just a moment. [Brief pause.] I have no further questions.

Cross-examination by Mr. Maguire

X-Q. Mr. Hurst, prior to your taking the stand today you used certain memoranda to refresh your memory? A. Yes.

[732] X-Q. You have a diary, Mr. Hurst? A. Yes.

X-Q. Did you use that to refresh your memory? A. Yes.

X-Q. What else have you used? Did you use this—what was this memorandum relative to the conference you spoke about here? A. That was a memorandum prepared by Mr. Isber.

X-Q. You used that prior to getting on the stand to refresh you memory? A. And while I was on the stand, yes.

X-Q. You have read it before you got on the stand, as well? A. Yes.

X-Q. In addition to your—Is this your diary, these two books your diaries for the year, Mr. Hurst? These apply to other cases as well as the Massei case? A. Many others.

X-Q. Many others. And do I understand that you have taken the pertinent parts as they apply to the Massei case and reduced them to memorandum? A. Yes.

X-Q. Can I have that, please?

The Court: Just only so far as they concern, you know, the production of the memos that are connected with this case, not with other cases.

Mr. Maguire: That's why I don't want the diaries, if your Honor please.

[733] The Court: I tell you, you may indicate—you know what they are. Isn't that right? You know where these memos are in the diary?

The Witness: Yes, I can find them in the diary, your Honor.

The Court: Will you point them out?

X-Q. I call your attention, Mr. Hurst, to an untitled 6-page document memorandum and ask you to please describe what that is, for the record. A. These are copies of diary entries starting with the date November 7, 1951, and ending

with December 30, 1952, taken directly from my diary pertaining to the case of William Massei.

X-Q. There is nothing in your diaries that pertains to the Massei case other than what appears in this memorandum? A. To the best of my knowledge.

X-Q. Fair enough. And you used this memorandum to refresh your recollection and memory in getting on the stand here? A. And for convenience.

X-Q. And for convenience. Now, in addition, you referred to a memorandum drawn up by Mr. Isber; is that correct? A. Yes.

Mr. Maguire: May I have that, sir?

[A pause.]

X-Q. Mr. Hurst, while they are looking for that document of [734] Mr. Isber's, did you use anything else in order to refresh your recollection and memory concerning — A. I went over my report, I went over a number of work papers and a number of exhibits that I put in with my report, I went over certain letters that were in the file. I tried to go through the file of the whole case.

X-Q. Let me ask you whether there was any memorandum prepared by Mr. Calatrello which you used to refresh your memory before coming on the stand? A. There was a memorandum with respect to the contents of the safe deposit box and the conversation therein.

X-Q. And that is the document which you now show me? A. The last page contains—

X-Q. I am sure we will come to that later, Mr. Hurst. A. All right.

Mr. Maguire: Do we have this other, Mr. Koen?

Mr. Koen: Oh, I have it, yes. [Handing.]

X-Q. Now, Mr. Hurst, will you describe this document which bears the title "Conference Memorandum." Describe it for the record. A. This is dated May 21, 19—

Mr. Koen: I don't know the purpose of this. I think

it has already been incorporated in the record when I examined Mr. Hurst about it.

Mr. Maguire: As a matter of fact, if Your Honor please, there was a great mystery about it. I tried to have them identify it and they wouldn't.

[735] Mr. Koen: Well, now, I am going to object to that statement. There has been no great mystery about anything in this trial.

The Court: I think that remark may be disregarded. No one has tried to create any mystery, neither you nor Mr. Koen, or his associate, at all.

X-Q. Will you describe that for the record, Mr. Hurst? A. This is a conference memorandum dated May 21, 1952; office symbols: CC:P:MYR:DD:CJI. No. 501825. Present: W. Arthur Garrity, Jr., Special Agents Harold Hurst, Charles J. Isber. Held 1033 Post Office Building, Boston, Massachusetts. Date May 20, 1952. In re William V. Massei, Worcester, Massachusetts. Signed by Charles J. Isber.

X-Q. You used that memorandum to refresh your recollection prior to coming on the stand? A. Yes, I did.

Mr. Maguire: Now, if your Honor please, I would like an opportunity to examine those three documents referred to.

The Court: I am not going to permit these documents that are used, to be used to refresh a witness' recollection except in the usual way that they are, right in this court room. You have all the chance in the world to look at them.

Mr. Maguire. Thank you. May I have a short time, if your Honor please, to examine them here at the table?

The Court: No, as the witness goes on— Will [736] counsel come up.

[Conference at the bench, during which the following is recorded:—

The Court: I am ready to give my reason for not

showing this and I want it put on the record. I permitted it to be used by you once before, and while you were up here talking with me, Mr. Garrity was copying those memoranda.

Mr. Maguire: If your Honor please,—

The Court: It was called to my attention. That's why I'm not going to permit it.

Mr. Maguire: For the record, it is the defendant's position that anything that is used to refresh a witness' recollection he has got every right to examine and make notes.

The Court: He has. You can examine it to your heart's content and as much as you want to.

Mr. Maguire: That is exactly the examination that took place.

The Court: You have a right to examine it, but you have no right to engage me in a conversation up here at the bench while your associate is hurriedly making a copy.

Mr. Maguire: If your Honor please, I resent the fact that you—

[737] The Court: That's exactly what happened yesterday, wasn't it?

Mr. Maguire: It isn't what happened yesterday.

The Court: What?

Mr. Maguire: It isn't what happened yesterday.

Mr. DiMento: Yes, sir.

Mr. Maguire: It is not.

The Court: Mr. Garrity was seen copying those papers. He was seen doing it.

Mr. Maguire: It was not done while I was up here carrying on a conference.

The Court: You were talking to me, I'll tell you now, right here. I'm not going to permit it. I will let you refresh your recollection with that memorandum

to your heart's content. You can take as much time as you need. You can read it here. That's the way it's done. Listen, Mr. Maguire.

Mr. Maguire: May I do it back at the table?

The Court: What? You mean you want to read it now?

Mr. Maguire: Of course, if your Honor please. I have seen part of it. I haven't seen it all.

[738] The Court: If you want to take it back there and read it, go ahead, we'll wait. No objection to that.]

Mr. Maguire: May I have the three memorandums?

The Court: Now do you want to take one at a time? Take the first one—because I want to let the jury get away a little early.

Mr. Maguire: Well, if your Honor please, all three tie up pretty much the same subject matter and I would like to read them all together.

The Court: Well, what I'll do is this. I'll let the—. Have the attorneys come here on the other matter?

The Clerk: I don't see Miss Hassett here.

The Court [to jury]: I will let you go along now and look at them now until the Assistant United States Attorney comes up, then they can be returned to Mr. Koen, and you can have the same privilege tomorrow.

Mr. Maguire: Thank you, your Honor.

[A pause from 3:55 to 3:59 p.m.]

The Court: Well, now, Mr. Maguire, I am going to let the jury come because the Assistant United States Attorney has arrived here. And I will give the jury the same admonition I have given them before, even over-emphasizing the necessity of keeping your minds wide open and free from anything that would cause prejudice and bias to the defendant or the Government. [739] Just have in mind that we will simplify this situation for you. I will tell you what sort of a case it is and what the yardstick is, and I'll

try to make it as simple as possible. I am not going to discuss the law on it because I don't think this is the time to do it, until all the evidence is in. And then I will discuss in the charge the law. And I think I'll let counsel know exactly what I am going to charge.

I suggest also, while I'm on it now, for fear I might forget tomorrow, I will be happy to entertain from the Government suggestions with respect to requests for rulings. The Government, of course, and the defendant has a fundamental right to do that. I am always happy to get them from the Attorney General, and I'm imposing the burden on my young friend. But, whoever it is, I think you want to have the judgment or request for rulings. And of course Mr. Maguire's situation is entirely different. He has the right fundamentally to call upon me to do it, and I still think I am under a moral right to give the same consideration to the requests although they are spelled out differently because after all—well, I am not going to give the reasons. So will you please refrain from having any prejudice of any kind, coming to any conclusion. These figures will be available to you here, and they will be referred to, probably, a good many times. And with that short passing remark, which is in many ways a repetition of what I have said to you in a fuller way, I am going to bid you good afternoon and, God willing, I will see you tomorrow morning.

[740] Mr. Maguire: May I continue to examine these, or do you want me to return them?

The Court: I think if you give them to Mr.—

Mr. Koen: Give them to Mr. Walsh. They are not in evidence but I'd just as soon have Mr. Walsh hold them.

The Court: Wait until the jury goes out.

[The jury retires at 4:01 p.m.]

[741] The Court: In the interest of saving time, so we can go along more expeditiously and really out of defer-

ence to the rights of this defendant, I am inclined to permit counsel to examine these in the court room and you will not have to stay. I will designate Mr. Walsh as the custodian and he will stay while they are being examined.

Mr. Koen: I never denied his right to examine but I do object to his making copies of them.

Mr. Maguire: We are allowed to make notes from this?

The Court: I don't think so. You have a right to go back to your office and make any notes you want to. I am trying to help you out and, as a matter of fact, all you get in the trial of any case is exactly what I am giving you. I am giving you that right. I think you should have a right to use these, but please remember, a witness can use any kind of a memorandum.

Mr. Maguire: I understand that perfectly, your Honor.

The Court: Any kind of a memorandum, the contents of which would tend to refresh his recollection, and you, by the same token, have a right to use the contents of that memorandum for the very useful purpose, which is fundamental to the right of any lawyer defending his client, and that is to impeach the witness's credibility, to test his memory, to show contradictory statements, to show he was mistaken. I assure you you will have full opportunity to do that, but these are memoranda that [742] come from the files of the Department. They are quasi confidential in character. They were used by this man to refresh his recollection. Some of them were drawn by him and some were not. I think you have a right to sit down with Mr. Garrity and look over them right in this court room and I think it would be advisable that you be given that chance now and I will ask Mr. Walsh to stay so that you can do that.

Mr. Maguire: Thank you, your Honor. Just one last request. May we make notes from these memoranda?

Mr. Koen: One of these, may it please the Court, as

you have well stated both during the voir dire and during the conference just now, is a confidential memorandum. Perhaps the veil of confidentiality has been ripped, but nonetheless I do think copies of that should not be made.

The Court: He is not going to make copies.

Mr. Koen: Or notes of its contents.

The Court: I think whatever notes Mr. Maguire, you have a right to make any notes you care to make within the confines of your own office or outside, and then you have the right to look at them again tomorrow. I am not saying because you are looking at them today you can't look at them tomorrow, but it is better under all the circumstances, and I am trying to help you in every way I can. If there is anything you need in the way of elucidation, predicated upon an inability to remember precisely what is there tomorrow, you have a right to go over it [743] again. I am not tying it down. I am trying to help you so that you can go over those and try to remember in order to prepare whatever questions you care to ask a witness. Let's go along, now.

Mr. Koen: May we go to the bench?

[Conference at the bench:

Mr. Koen: This is on an entirely different matter. Your Honor suggested today you would not permit the blackboard to go to the jury room.

The Court: It was suggested in the Holland case by Justice Clark.

Mr. Maguire: I would strenuously object to it.

The Court: I think it is within the orbit of my discretion. As I gather the opinion, he said if it was unnecessary—

Mr. Koen: All right. Now, would there be any objection on the second computation, which is the computation of the taxes, if I prepared charts showing the

taxes, how they were arrived at by the Revenue Agent who will testify? They will be on the board.

The Court: No, not a bit.

Mr. Koen: Is it all right if I have charts prepared, photostatic copies of his testimony, for presentation to the jury, which is an accepted way of doing it?

[744] The Court: What is the difference? If they take them up to the jury room?

Mr. Koen: One is a computation of tax and the other is net worth.

Mr. Maguire: Do I understand you want this computation of tax to go to the jury room?

Mr. Koen: Yes.

Mr. Maguire: I strenuously object again.

Mr. Koen: All right; never mind.

The Court: I am not going to pass on it today, anyway.

Mr. Koen: I would have to have the mechanics set up tonight, that's all.

The Court: Get yourself ready for it. I am not excluding it.

Mr. Koen: If there is going to be a hassle—

The Court: Get it ready. I think it is still within the orbit of my discretion.

Mr. Maguire: Judge, I am not clear. Did you say we might make notes?

The Court: No. I said no. You could make notes in your own office.]

[Adjourned to 10 a.m. Friday, April 13, 1956.]

Court Room No. 5
Federal Building, Boston
April 13, 1956.

[Without the jury.]

[Conference at the bench:

The Court: These memos that you requested copies of, they were used for the purpose of refreshing a witness' recollection. They are not in evidence. For example, suppose you discovered something that would impeach the credibility of a witness, the only thing I would allow you to do would be to read that part. The other wouldn't be admissible. I think that the government was very nice about it because one of them, as I understand—I haven't seen them—one of them was a confidential record. I want it made a matter of record you have had full opportunity to examine them. I suggested to Mr. Walsh that he come in at quarter of 10 and if Mr. Maguire hadn't finished, he could go over them. Have you had full opportunity?

Mr. Maguire: That is correct.

The Court: I want it in the record that I have extended to counsel, Mr. Maguire, full opportunity to examine these memos which the present witness, Mr. Hurst, has used to refresh his recollection and which [746] in the voir dire examination, to some extent, were used by Mr. Isber to refresh his recollection.

Mr. Di Mento: It might also be added for the record that the substance of the memorandum was given to Mr. Maguire a week ago last Tuesday, the day we had the all-day recess.

The Court: That's all right. I want to have the record show that now you have had full opportunity, because I think you are entitled to it.

Mr. Maguire: Thank you, your Honor, I have had. May I raise another subject? The question of requests for rulings. It is possible the government might finish today.

Mr. Koen: Don't look at me. How long are you going to take on cross?

Mr. Maguire: Not long. What I had in mind was whether if, perchance, the government does finish today, query, whether we might have until Saturday or Monday in order to have time to prepare these requests.

The Court: It all depends on what you are going to do. I intend to bring this jury in Monday and finish it up, if I can. I don't want to hurry you.

Mr. Maguire: Even over night, your Honor. If we are going ahead Monday, fine.

The Court: Suppose, for example, that you rested [747] at 12 o'clock today, I certainly never would ask counsel to argue today and then argue part Monday and charge, because I have never done that. I have suffered a lot of inconvenience in not doing it.

Mr. Koen: I wouldn't want that, sir.

The Court: You get into the night hours and then when you get into those hours, I don't lock a jury up nights; I send them to bed. You won't have any trouble.

Mr. Maguire: I just wanted to make sure.]

[Further conference at the bench, not reported.]

[748] The Court: Bring the jury down.

[The jury entered the court room at 10:33 a.m.]

The Court: I have been talking to Mr. Canavan, and counsel for the parties here, discussing matters in your absence which were necessary to have discussed in your absence so that no prejudice would be caused one way or the other. I think when I say that all counsel agree, I

have substantially stated it. Isn't that right? So we'll go ahead.

HAROLD HURST, Resumed.

Cross Examination by Mr. Maguire.

X-Q. Mr. Hurst, let me direct your attention to Government's Exhibit [handing]. That is the stock dividends and interest for the years '45 through '50 turned over to you by Mr. Garrity, having been compiled from the defendant's records.

Mr. Koen: '45?

X-Q. Is the year '45 there as well, Mr. Hurst? A. Yes, I think so.

X-Q. Now, did you check the accuracy of that exhibit? A. Personally I did not.

X-Q. I see. Did Mr. Calatrello? A. I believe I gave it to him to check.

X-Q. Let me ask you this. Did it ever come to your attention that there were any inaccuracies in it as related to the defendant's tax returns for these years? A. I believe it to be substantially correct, if not completely [749] correct.

X-Q. Completely correct so far as you know? A. As far as I know.

X-Q. Now, Mr. Hurst, as far as the assets of the defendant are concerned,—that is these figures you have on the blackboard there [pointing]? A. Yes.

X-Q. Basically, there has never been any dispute between the Government and the defendant on what those assets amounted to; is that a fair statement?

Mr. Koen: Object.

The Court: I think I will have to exclude that.

Mr. Maguire: Well, I think—

The Court: In the form it is in, Mr. Maguire.

Mr. Maguire: Well, I grant you, your Honor. I am trying to save a little time. I don't think there is any dispute about them at all.

The Court: He has already said it was substantially correct.

Mr. Maguire: No.

The Court: It was completely correct as far as he knew. [To witness] Didn't you say that?

Mr. Maguire: No, if your Honor please, that relates to the dividends and dividends which were picked up from the defendant's tax returns.

[750] The Court: What is the next question?

Mr. Maguire: Now I'm calling his attention to the assets, the net worth, the assets as listed in the net with [sic] of the defendant.

The Court: On what date?

Mr. Maguire: Well, each of the five years, six years listed on the board.

The Court: Let me have the question, Mr. Maguire.

X-Q. Mr. Hurst, is it fair to state there has never been any dispute between the Government and the defendant as to the assets which belonged to Mr. and Mrs. Massei?

Mr. Koen: Note my objection.

The Court: I will have to exclude that question.

X-Q. Well, Mr. Hurst, when Mr. Garrity came in representing the defendant, he turned over to you bank books, cancelled checks, bank statements, and other documentary evidence? A. He did.

X-Q. He also furnished to you information which you requested relating to other assets of the defendant? A. He did.

[751] X-Q. And the only item which he did not tell you about completely, Mr. Hurst, of all the items that are listed on that blackboard, and for the record may that blackboard, may it be noted, is the net worth compilation

of William V. Massei for the years 1945 through 1950,—was the item relating to the Baker real estate in the year 1946, and I am pointing to the figure of $1,125.

Mr. Koen: Now I am going to object.

The Court: He is talking about 1946.

Mr. Koen: No, he is not, your Honor. The question calls, if I understand it, for a recitation by this man of the turning over of certain information and the question wants to know if the complete information was turned over. If I understand the question correctly.

Mr. Maguire: Will you read the question?

[The question is read.]

The Court: I will exclude that question.

X-Q. Well, let's talk about this Baker check. At some time Mr. Garrity submitted to you in writing a list of the real estate holdings of the defendant? A. He did, yes.

X-Q. And you brought out, I think, in your testimony yesterday that that did not include some land which he had purchased in 1946, half interest in some land with Chief O'Leary, in which he paid $1,125? [752] A. That's correct.

X-Q. Now, relative to that, Mr. Garrity did turn over to you certain checks on the Worcester County Trust Company in an account standing in the name of Isabel Massei? A. He did, yes.

X-Q. And one of those checks that was turned over to you was a check in the amount of $1,025 payable to this same Mr. Baker by Mrs. Massei? A. I am not certain whether that was out of the Worcester County Trust Company checking account or was out of a savings account.

X-Q. In any event there was a check drawn by Mrs. Massei payable to this Mr. Baker? A. There was a check drawn payable to the heirs of Benjamin F. Baker but what account it was drawn on, I would have to refresh my recollection.

X-Q. In any event that check was turned over to you by Mr. Garrity? A. I would have to refresh my recollection because certain checks were gotten directly from savings banks.

X-Q. Well, in any event it was that check which in effect gave you the lead to search down on what this money was spent for? A. Oh, yes. Yes.

X-Q. And in the course of your investigation of that land, you had a conversation with Chief O'Leary? A. Yes.

[753] X-Q. And you discovered, in the course of your investigation, did you not, that there was a defect in the title of this land?

Mr. Koen: Object.

The Court: I will exclude it.

Mr. Maguire: Your Honor, will you hear us at the bench?

The Court: Oh, certainly, but I don't know how he can—I don't think I could characterize—.

[Conference at the bench:

Mr. Maguire: If your Honor please, what I want to bring out from this witness, there was a defect in the title, never mind what the defect was; that the land was land courted and that actually the land court title did not come through until I think it was January of 1951.

The Court: You can show that in another way. I won't stop you. Your claim is that this money is money that is a part of the increase, isn't it, on your net worth theory?

Mr. Koen: And that is cost to him in that period and that is the only element involved.

The Court: I exclude it in that form, anyway.

Mr. Koen: Whether he made a poor buy is not an element.

The Court: I have to exclude it.

[754] Mr. Maguire: Save my rights, if your Honor please.

The Court: Oh, certainly. You don't deny that there was that sum of money paid by him for the purchase of that land at some time? You don't deny that there was that sum of money set aside for the purchase of that land?

Mr. Maguire: No. I am simply bringing out they made a big point of it yesterday and I want to show the reason why it was omitted from the statement by Mr. Garrity.

The Court: If he had any talk with Mr. Garrity with reference to it, I have allowed the evidence to go in under the reservation I have made.

Mr. Koen: Again may I say this for the record, your Honor, that this was an element of cost to this man and whether he made a poor buy is of no consequence.

The Court: What you are trying is a wilful tax evasion on a net worth theory which, reduced to plain English, is a circumstantial evidence theory.

Mr. Koen: Exactly.

The Court: Now, the question of wilfulness is one of the elements and if he had any talk with Mr. Garrity in connection with that—

Mr. Koen: No, he did not have a talk with Mr. [755] Garrity.

The Court: I don't know whether he did or not. I won't stop that. I have allowed this evidence in with proper instructions later on, anything he may have said to Mr. Garrity or that Mr. Maguire claims he said to Mr. Garrity, I am going to permit it.

Mr. Koen: But the information which he is now attempting to elicit is information that comes second or third hand to this man.

The Court: I have excluded it because it isn't sufficient for this man but I am not interfering with your right in the proper way, Mr. Maguire, to show that there was nothing wilful.

Mr. Maguire: I will ask him if he knows about the Land Court title, your Honor. He went down to the Registry.

The Court: You can ask him if he went down and examined it, sure, I don't mind that.]

X-Q. One more question on this subject, Mr. Hurst: Did you have any personal knowledge as to whether the title of this land in Harwichport was land courted?

Mr. Koen: Object.

The Court: I will allow that. Personal knowledge.

A. Yes.

X-Q. Do you know the date when the Land Court title came through? [756] A. Some time in 1951.

X-Q. That is, although the land was actually supposedly purchased back in 1946?

Mr. Koen: Object.

A. That's correct.

Mr. Koen: Wait a minute, please.

The Court: I will exclude that question in that form. When you speak of the land, I won't exclude anything which will show it is the same land that title was passed on in 1951.

Mr. Maguire: It is the same land, there isn't any doubt, your Honor.

Mr. Koen: I am going to object to the word "supposedly" in that question. I don't believe there is any contention this was an asset—

Mr. Maguire: I will strike out the word "supposedly".

Mr. Koen: Will you have the question read back?

[The question is read as follows: "That is, although the land was actually purchased back in 1946?"]

Mr. Koen: My objection still is put, sir.

The Court: I will admit it.

X-Q. The answer, Mr. Hurst? A. Yes.

X-Q. You testified that the defendant, Mr. Garrity turned over to you this documentary evidence such as bankbooks and so forth. He also furnished you in writing information which you requested [757] on other aspects of the defendant's assets?

Mr. Koen: Wait a minute, please. You don't want that.

[The question is read as follows: "You testified that the defendant, Mr. Garrity turned over to you this documentary evidence such as bankbooks—"]

Mr. Maguire: Defendant's attorney, Mr. Garrity. Thank you.

X-Q. Now, throughout the course of your investigation did you find Mr. Garrity cooperative? A. Very cooperative—

Mr. Koen: Wait a minute, please. I object. It is a relative term.

The Court: No, I will allow that. I have allowed testimony to go in with respect to—

Mr. Koen: All right, sir.

X-Q. What was your answer? A. Very cooperative, Mr. Maguire.

X-Q. Now, Mr. Hurst, directing your attention to the blackboard, you have, for each of the five years in question, an item entitled "Increase in net worth"? A. Yes.

X-Q. And that item, as you explained yesterday, represents the increase in assets from 12-31-45 to 12-31-46? A. No. Increase in net worth, assets less liabilities.

Mr. Maguire: Fine. Let's not forget the liabilities. [758] Now, the figure, Mr. Hurst, for the year 1946, increase in net worth is $27,265.38? A. Yes.

X-Q. Now, you have included that and it is on the

basis of that figure that the defendant's alleged additional tax is calculated? A. Yes.

X-Q. And that figure is included on the assumption that whatever figures, and largely in this case the annuity, that the money that was used to purchase the annuity in the year 1946 was money actually received by the defendant in 1946? A. Yes.

X-Q. And furthermore, that not only was the money received by the defendant in 1946, but that money was actually income to the defendant in 1946? A. That's the government's allegation.

X-Q. That's correct, and it is on the basis of those assumptions that these figures are drawn up and you ultimately reduce them to what you claim is the additional tax owed. A. Yes.

Mr. Koen: Wait a minute, please. There is nothing about additional tax owed on that blackboard.

Mr. Maguire: I appreciate that, Mr. Koen.

The Court: All the government has to show is likely income during this period; isn't that a fair statement?

Mr. Maguire: I don't know whether you want to get into [759] that now, your Honor.

The Court: You are saying actual income. It is likely income.

Mr. Maguire: I am sure you will instruct as to what "income" means.

The Court: I don't know. I will instruct them as to what I think is the law on the subject.

X-Q. Let me continue along, if you will, please. Increase for the year 1947 is $9,991.64? A. Yes.

X-Q. And there again you have made the same assumption, that it was received by the defendant in the year 1947 and that it was income to the defendant in that year? A. Yes.

X-Q. Let me take you to the next year. The increase is

$5,533.22. You have made the same assumptions? A. Yes.

X-Q. The year 1949, the increase of $9,000-odd, the same assumption? A. Yes.

X-Q. And in the year 1950 the increase of $36,000-odd, the same assumption? A. Yes.

X-Q. Now, this increase in the year 1950, you assumed that that came to him in the calendar year 1950?

[760] Mr. Koen: This series of questions, may it please the Court, has been on assumption. I am not too sure that "assumption" is the right word and I am going to object to the word "assumption".

Mr. Maguire: It obviously is an assumption, if your Honor please—

Mr. Koen: Wait a minute. I pray your Honor's judgment.

The Court: I am going to ask you to keep your minds open. Come up and see if I can clarify this situation to the jury. If counsel will let me, I will do it in simple language. Come up.

[761] [Conference at the bench, during which the following is recorded:—

The Court: I don't want to do this unless counsel agree to what I am stating. I would like to tell the jury what the net worth theory means. You start off with an income basis at a certain period of time, alleged income basis, and then it is predicated upon a net worth theory which is a theory of circumstantial evidence in contradistinction to some of the other tax cases.

Mr. Maguire: Look, if your Honor please. There are two other elements in a net worth case.

The Court: What are they?

Mr. Maguire: They have got to establish a fixed starting point with reasonable certainty.

The Court: That's right. I mean that. Mr. Koen agrees to that.

Mr. Koen: I fixed the starting point.

The Court: Yes, you fixed the starting point and then they go along. Let me, for example, say this to you.

Mr. Koen: Not thinking about it. I fixed the starting point.

The Court: Let me say this to you, Mr. Maguire. Take your last question. The [762] Government doesn't have to prove the exact figures. I have got to tell this jury. They have got to prove them substantially.

Mr. Maguire: There isn't—

The Court: Wait a minute. This jury has a right to consider—

Mr. Koen: They need not be entirely accurate.

The Court: I will take this to clear it up. On this net worth theory the jury should find—I'm not saying they should, but the jury should find—that, for example, that big item that was paid in 1950 for—what is it—annuities, might well have come to him for the period within the years of taxable responsibility. Isn't that right?

Mr. Maguire: If your Honor please, it is the defendant's position there is no evidence in the case from which the jury could draw that inference.

Mr. Koen: My basic objection is this. Counsel has been using the word "assume," and in the first two questions he changed the basis of the assumption. Actually, it is not an assumption: it is a conclusion based on evidence.

The Court: That is what he said yesterday.

[763] Mr. Koen: And that is the basis of my objection.

The Court: What I would like to say is, in these

cases you get a starting point; isn't that right? That is the general formula taken.

Mr. Maguire: Well, if your Honor please, the element we are really scrapping about is the source, and it is obvious, if your Honor please, the Government and the defense do not agree.

The Court: That's right. That's generally so.

Mr. Maguire: I understand. I simply say that to you for the purpose that if you do get into a discussion of source at this time—

The Court: Well, Mr. Koen agrees with me that if this jury finds that this money represents monies that were in his possession—the jury find that—before December 31, 1945, then he could not be found guilty. But, mind you, I have before me, using the very words of the Holland case, which says "likely income;" and I assume the Government is going to contend that while he was a police officer he had the same opportunity to get money as he did before. I am going to permit that. I am going to permit it [764] because I think it is a question of fact for the jury.

Mr. Maguire: If your Honor please, when we get to that, the defendant is going to object.

The Court: I know the defendant is going to object, but that's one thing I'm going to do.

Mr. Maguire: Of course, your Honor please, I would like to say before you get that far, I would like to be heard again.

The Court: You can't show me any authority that says that isn't so.

Mr. Maguire: Yes, if your Honor please, I think I can.

The Court: I have read all those cases very carefully.

Mr. Maguire: There are other cases that bear on the other side of the question.

The Court: The only case I know that has come down is the case from the Third Circuit—what's the name?

Mr. DiMento: Adonis case.

The Court: That's the only one.

Mr. DiMento: There's been another one, your Honor, since the four Supreme Court cases.

The Court: Yes, I think I have read that [765] one.

Mr. DiMento: The Ford case, out in Texas.

The Court: Was it a Circuit Court of Appeals Opinion?

Mr. DiMento; Yes.

The Court: I haven't read that.

Mr. DiMento: I'll get you the citation. I think it is 210.

The Court: Did it go to the United States Supreme Court?

Mr. DiMento: No, it didn't.

[The Court confers with Mr. Healey.]

The Court: I don't think we looked at the Ford case. It is 210. Does it change the situation?

Mr. DiMento: In that case there was a chief of police in Texas and allegedly his source was graft. However, the Government was unable to get sufficient evidence that money paid in by a prostitute actually came to the chief; the Government wasn't able to show that the bundle of money got into the Chief's pocket. The case says a policeman is presumed not to take graft. I think it is significant from this point of view. Here we have rebutted that presumption, I think pretty [766] clearly, by the history of all these years on the force.

The Court: I don't hesitate to tell you very frankly

that if that is the case, I don't agree with it. I don't. Listen, there is no presumption, I wouldn't talk about presumptions. In the light of my experience, my long experience and training, I would never say that.

Mr. Maguire: That's the same thing.

Mr. DiMento: That is a case most relevant since the four Supreme Court cases.

Mr. Maguire: I'm going to follow the Supreme Court on that.

Mr. Koen: You haven't settled the primary problem of my objection, objection to a question which includes the word "assume".

Mr. Maguire: I'll withdraw that question.

The Court: The witness testified this was prepared practically on the basis of disclosures that Mr. Garrity made on a net worth basis, and you have already got in an answer—I think it is competent—bearing on the question of source. But I haven't read that Ford case.]

X-Q. Mr. Hurst, you mentioned in your testimony yesterday that you recollected that Mr. Garrity, when he came into the case, [767] filed a power of attorney? A. That he had left a power of attorney; that there was a power of attorney; that I was satisfied there was a power of attorney.

X-Q. And I also believe you testified you have no memory as to the scope of the power of attorney? A. The contents. That is correct.

X-Q. None whatsoever. You know there was a power filed, otherwise you couldn't have been talking to him as representing the taxpayer? A. Yes, substantially.

X-Q. One of the reasons for the necessity of a power, Mr. Hurst, is that the Treasury of course wouldn't talk to someone about a taxpayer's tax returns unless they were satisfied the taxpayer authorized that person to receive the information? A. I suppose that is the reason, yes.

The Court: Well, it is the regulation, isn't it, of the Treasury Department that it is to be filed?

The Witness: He asked me the reason, your Honor.

The Court: Well, I don't think—the only one that can give that reason is the Secretary of the Treasury. I don't think anyone can.

X-Q. Now, Mr. Hurst, during the course of your investigation, you had in mind that it was important from the point of view of the Government's case to establish what we will call source? A. Oh, yes.

[768] X-Q. And in terms of the years in question, which are the years 1946 through 1950, it is up to the Government to satisfy this Court and jury that the source of this alleged—or establish for the Court and jury what was the source of this alleged income.

Mr. Koen: My objection.

The Court: I will exclude that question.

X-Q. It is fair to say, in any event, Mr. Hurst, that you did recognize the importance of this—

Mr. Koen: My objection.

X-Q. Did you devote any of your time on this investigation toward developing evidence on this question of source?

Mr. Koen: My objection.

The Court: I will allow that question. I am not going to allow any cross— Just that question may be answered.

X-Q. Do you want that question read again, Mr. Hurst? A. Yes.

Mr. Maguire: Would you read it?

[Last question read.]

A. Yes.

X-Q. Now, Mr. Hurst, you testified yesterday that you used your diary to refresh your recollection prior to testifying here? A. And during testifying.

X-Q. And during testifying, yes. And you have in front of you now [769] your diary and also the memorandum

which you made up, which is an exact copy or as close as you can make it, from your entries pertaining to this case? A. Yes.

X-Q. Now would you tell us, Mr. Hurst, what is your practice, what was your practice in terms of making diary entries? Would you make them the same day, at the close of the day? A. It varies. Sometimes on the same day, sometimes the next day, depending on how busy I was. Sometimes I wasn't in the office for two or three days and I'd come back.

X-Q. Is it fair to say you made them as soon as you possibly could, bearing in mind your work varied? A. I had a great many things in my mind. I made entries when I could, Mr. Maguire.

X-Q. Well, in any event would it run over two or three days after the particular event that you recorded? A. Probably not.

X-Q. You made those in longhand? A. Yes.

X-Q. Mr. Hurst, what is the last entry in your diary? Will you give me the date of it, please? A. With reference to this case?

X-Q. Yes, please. A. I believe it was September 30, 1952.

X-Q. Now will you take your diary and tell me for certain, please. [770] A. I would have to check all my diaries forward from this date, September 30, 1952, to the present day. I have entries in my 1956 diary pertaining to testimony here, that I was here.

X-Q. I am not sure I understand. Let me ask you, in terms of the memorandum which you prepared, what is the last date you have recorded there? A. September 30, 1952.

X-Q. September 30, 1952? A. Yes.

X-Q. Now, in terms of that, when did you leave the Government service, Mr. Hurst? A. I think it was February, 1953.

X-Q. And did those diaries remain in your possession? A. Always, yes.

X-Q. Now let me call your attention to the inventory and summary prepared by Mr. Calatrello at the Westerly bank. A. Yes.

X-Q. What was the date of that, please? A. The date of our visit to the Westerly bank?

X-Q. Yes. A. It was November 27, 1951.

X-Q. Now, when was the first time after that that you saw this memorandum of Mr. Calatrello's? A. I saw it while we were in the safe deposit box.

X-Q. As I understand, you took the items out of the box and read [771] them off, and Mr. Calatrello copied them down; is that it? A. As I remember it, yes.

X-Q. There is attached one or two sheets to the inventory and that is what is entitled a summary? A. One sheet is entitled a summary.

X-Q. When was that prepared?

Mr. Koen: If you know.

A. I don't know. Some time after.

X-Q. Some time after? A. Yes.

X-Q. And now, Mr. Hurst, can you tell me when was the next time that you saw that memorandum summary sheet after leaving the Westerly bank? A. I couldn't possibly remember, Mr. Maguire.

X-Q. Well, let me ask you. You saw it, of course, preparatory to your testimony here, in terms of preparation of the case? A. Yes.

X-Q. And when did you start to prepare the case, or when were you called in, Mr. Hurst? A. I think my subpoena was on a Tuesday, March 27th. I forget the date, but it was a couple of weeks ago.

X-Q. I see. Well, had you talked with the United States Attorneys prior to that time? A. You mean in the—

X-Q. Within the matter of a month? [772] A. Oh, no, I don't think so.

X-Q. Well, do you recall, Mr. Hurst? A. I got a call from the U. S. Attorney's office that this case was coming up. I don't recollect the date when Mr. Koen—

X-Q. At some time did you have a conference with them after that telephone call? A. Yes, I went down to see them.

X-Q. Well, fine. When was that? A. Within the last three weeks, I believe.

X-Q. Well, let's try to fix it as a point of time. Was it a matter of a week prior to the opening of the trial? A. Within a week prior to the opening.

X-Q. And at that time you were shown what I might term the Calatrello memo? A. Oh, no.

X-Q. You weren't shown the Calatrello memo. A. No.

X-Q. When were you shown the Calatrello memo? When is the first time you have seen it since you received a telephone call from the U. S. Attorney? A. Within the last two weeks; at the beginning of the week prior to the current week I started to go through these files and came across this memorandum, along with a great many other papers.

X-Q. Now let me ask you about this memorandum which was dictated [773] by Mr. Isber [handing]. A. Yes.

X-Q. That related to a conference with you, Mr. Garrity and Mr. Isber back—what is it—May of 1952? A. May 20, 1952.

X-Q. When was the next time, or when was the first time that you saw the memorandum after that date? A. My best recollection is the first time was last week.

X-Q. Last week. And that was in a conference with the United States Attorneys? A. In the United States Attorney's office as I was going through those papers.

[774] X-Q. Do I understand your testimony, Mr. Hurst,

is that that is the first time you ever saw that memorandum, was this week, prior to the trial?

Mr. Koen: Is that what the witness said?

Mr. Maguire: Will you read it, please?

[The answer is read.]

A. My best recollection, Mr. Maguire.

X-Q. That's all we want, Mr. Hurst. Mr. Hurst, I would like you to turn to your diary entry for January 24th, 1952. Yesterday on the stand—Mr. Koen, I am reading from page 662 of the transcript—yesterday on the stand, Mr. Hurst, you testified in answer to the following question, as follows:

> "Q. All right. Having in mind the statements of the Court, will you tell us the conversation that was held between you and Mr. Garrity on that date, excluding that portion which is the subject of the Court's ruling. A. Mr. Garrity said that the money that showed up on the net worth statement had been accumulated prior to 1945; that Mr. Massei had received gifts, or graft, or call it what you will, when he was a patrolman on Shrewsbury Street between 1923 and 1931, while letting liquor trucks roll through Worcester, and when he was on the Vice Squad between 1933 and 1943."

Now, Mr. Hurst—

[775] Mr. Koen: Will you read the rest of it, please?

Mr. Maguire: I will.

> "Mr. Garrity also said that he probably would be willing to pay the deficiencies found by the Revenue Agent.
>
> He said—I said, rather, that I still wanted an affidavit from Edward Massei, which he had not yet provided for me, and that if I could not get it voluntarily, I would get a sworn statement."

The Court: Could I see counsel on an emergency matter?

[Conference at the bench on another matter.]

[Discussion off the record.]

The Court: All right; go ahead.

X-Q. Let me go back, if I may, Mr. Hurst. The question:

"All right. Having in mind the statements of the Court, will you tell us the conversation that was held between you and Mr. Garrity on that date, excluding that portion which is the subject of the Court's ruling."

And may it appear in the record that it is referring to the date of January 24, 1952.

"A. Mr. Garrity said that the money that showed up on the net worth statement had been accumulated prior to 1945; that Mr. Massei had received gifts, or graft, or [776] call it what you will, when he was a patrolman on Shrewsbury Street between 1923 and 1931, while letting liquor trucks roll through Worcester, and when he was on the Vice Squad between 1933 and 1943.

Mr. Garrity also said that he probably would be willing to pay the deficiencies found by the Revenue Agent.

He said—I said—rather, that I still wanted an affidavit from Edward Massei, which he had not yet provided for me, and that if I could not get it voluntarily, I would get a sworn statement."

Now, directing your attention to your diary entry on January 24, 1952, will you be good enough to tell us whether there is any reference whatsoever in that diary entry to this conversation of Mr. Garrity's that you have recited about gifts, graft, Shrewsbury Street and the vice squad? A. Not that part of it, Mr. Maguire.

X-Q. Let's be specific. Is there anything in your diary that relates to this conversation which you testified to yesterday relating to gifts and graft?

Mr. Koen: I object, may it please the Court.

Mr. Maguire: Your Honor please, this witness has testified on the stand yesterday—

Mr. Koen: Wait a minute, please.

Mr. Maguire: If your Honor please, I would like to be [777] heard.

Mr. Koen: If it is going to be a statement that will be made, let's make it at the bench.

The Court: Let me have the question first.

Mr. Koen: I will withdraw the objection.

The Court: No, let's have it. I think, Mr. Koen,—let's have it. You have a right to object.

Mr. Koen: I will withdraw the objection.

The Court: All right.

A. Do you want the answer?

X-Q. Yes, please. A. There is nothing in my diary entry as of January 24, 1952, that was the date, about gifts or graft or call it what you will, or trucks or Shrewsbury Street or the vice squad.

X-Q. Read into the record, please, exactly what is in your diary on that date.

Mr. Koen: I object.

The Court: No.

Mr. Maguire: Your Honor please—

The Court: I will let you call attention to any part of the diary, as I told you at the bench, any part of that diary which you can have read to the jury which you—it is for the jury to say and I am doing it only for the purpose of testing the memory or impeaching the credibility of the witness, and I made that perfectly clear to you, that that is the only reason [778] basically, that can be used for the admission of that and I thought, Mr. Maguire, I made it so clear to you that it should be followed.

Mr. Maguire: If your Honor please, I understood that perfectly and that is exactly the reason why I wanted it read into the record.

The Court: Call it to his attention. Pick it out.

Mr. Maguire: I want the entry of January 24, 1952.

Mr. Koen: I am going to object, may it please the Court.

Mr. Maguire: As it appears in the diary, and it is a total of about 10 lines.

Mr. Koen: The fact that the witness has used it to refresh his recollection does not make it admissible.

The Court: That's right.

Mr. Koen: And on that premise I object.

Mr. Maguire: We are offering it to affect his credibility.

Mr. Koen: I don't care what you are offering it for. The fact that you are offering it does not make it admissible and I object, sir.

The Court: I will allow it. Please don't misunderstand me; the weight of it is for you. Remember what this witness has said. Remember his testimony. Remember what his duties were and remember what the circumstances were under which [779] he made these memos. The memos are only made for the purpose of refreshing his recollection and the United States Attorney has a right to argue there were other means. Now, let me ask you this question, Mr. Maguire: Are you going to offer evidence to show that he wasn't told that? That memorandum that was read and from which he refreshed his recollection contains a notation that isn't consistent with what he was told?

Mr. Maguire: As of this minute, your Honor please, he testified—

The Court: No, no. Will you answer that question?

Mr. Maguire: I don't think I should be compelled at this point to answer that question.

The Court: If you do expect to—that is the ruling. If you expect to controvert—I will take you on your answer, on its face value. That is another yardstick that I will have to use.

Mr. Maguire: If your Honor please, I would like to

point out that we are going to offer evidence on this point. However, there is nothing in that particular diary entry that bears on what we are going to offer the evidence on.

The Court: Do you have any objection if I see it?

Mr. Maguire: No, I would like you to see it, your Honor.

[Conference at the bench, not reported.]

The Court: I excluded that testimony yesterday and I am [780] going to exclude it today. I am not going to have that piece of evidence go in.

Mr. Maguire: I would like to understand my position—

The Court: Please. You understand my position and I am not going to have any comment on it because I think I have certain fundamental duties to perform here and the introduction of that piece of testimony, in my judgment, is highly prejudicial to this defendant—

Mr. Maguire: If your Honor please—

The Court: No. I have ruled, Mr. Maguire, and you can save your rights.

Mr. Maguire: With your permission, sir, and I mean this respectfully, I can represent the defendant, and I appreciate your help, but we understand exactly what we are doing.

The Court: I know what my duties are and I have ruled on it and I am not interested in what this witness said your client would have to do.

Mr. Maguire: If your Honor please, I would like to make an offer of proof.

The Court: Haven't you made it yesterday and your rights saved?

Mr. Maguire: No, your Honor. I want this read into the record? I feel that it shouldn't be. Do you object, Mr. United States Attorney?

[781] Mr. Koen: As far as I am concerned, may it please the Court, my objection was predicated upon your ruling yesterday which dealt with the exclusion—

The Court: Do you object now to it being read?

Mr. Koen: If you will let me make the statement, I think it will clarify the situation. My objection was predicated on your ruling which was made yesterday on the direct testimony of Mr. Hurst, which excluded a portion of that January 24 entry. With that exclusion you made yesterday, I will withdraw any objection to putting it into the record and have the witness read it into the record.

The Court: If that is what you want. All right. I have indicated my point of view.

[Mr. Maguire confers with Mr. Koen.]

The Court: I have allowed the statement to be read.

Mr. Maguire: We were going to delete—

Mr. Koen: Delete the portion you said yesterday.

The Court: I have allowed it all to be read. You said you had no objection to it all being read. I have indicated my point of view. Go ahead and read it.

The Witness: [Reading] January 24, 1952. Arthur Garrity came up in p.m. Gave him back Massei bank records et cetera with exception of a few checks I wanted photostats of. With R. A. Calatrello present I told Garrity I thought I would recommend prosecution on the Massei case. Appears he would not [782] now hedge on amount of taxes to pay. Would probably be willing to pay the deficiencies found by the revenue agent. I also said I wanted an affidavit from Edward Massei still. If he won't give it voluntarily I will get a sworn statement. Pastore came in at the tail end of the conference.

The Court: It will be noted that is a statement I excluded yesterday and felt it should be excluded yesterday, but Mr. Maguire insists he is competent to represent his client and the United States Attorney does not object.

Mr. Koen: The United States Attorney has withdrawn his objection, sir.

The Court: Yes. Remember what I said before. I

have it carefully reduced stenographically so that there will be no doubt about it. I have allowed this evidence, the testimony, in connection with Mr. Garrity's activities or his talks with this agent and others, to be limited to the question of the authority of the agent to speak for the defendant, and that means on matters that do not involve contentions and arguments, but on matter which would lead to authority to speak as the agent for the defendant and the ultimate question of the authority of the agent, if Mr. Garrity made admissions binding on the defendant, will be for you, not as you receive it now but as it is to be received by you under proper instructions, and the proper instructions will be the instructions that I give you, and I have a very humble approach to it because if I [783] am wrong, it is the fundamental right of counsel to except to it and that is as it should be. A lawyer wouldn't be worth his salt in the court room if he didn't have that right and a judge wouldn't be fit to serve if he got provoked if a lawyer disagreed with him. I have profound respect for all these lawyers.

Now, that is the reason; that is the yardstick. This is cross-examination and it has gone in.

X-Q. Now, Mr. Hurst, you testified also, yesterday—Mr. Koen, I direct your attention to the transcript, page 682—there are some preliminary questions, but getting down to what I think is pertinent:

"Q. Can you tell us the approximate date or the time, Mr. Hurst, when this third such conversation dealing with the receipt of gifts from liquor trucks took place?

* * *

The Witness: In November or December, 1951.

* * *

Q. Who was present, if there was anybody else in

addition to yourself and Mr. Garrity, Mr. Hurst; do you remember?

• • •

Q. Tell us, if you will, the conversation as near as you can remember it, or the substance of that [784] conversation. A. The substance of the conversation was that Mr. Garrity went through Mr. Massei's police record as a police officer; that from 1921 until 1932—1923 until 1932, he was a motorcycle officer on Shrewsbury Street and that he received gifts or graft from liquor trucks passing through Shrewsbury Street during that period."

Now direct your attention, if you will, Mr. Hurst, to your diary entries for the months of November and December, 1951. I want you to examine those and tell me whether there is any reference whatsoever in the entries which you made in your diary during those two months to this testimony that I have just recited to you. A. There is a reference on November 30, 1951, the official police record of Massei.

X-Q. Is there any reference to he was a motorcycle officer on Shrewsbury Street and that he received gifts or graft from liquor trucks passing through Shrewsbury Street during that period? A. No.

X-Q. Now, Mr. Hurst, will you be good enough to recite the dates on which entries appear in your diary during the months of November and December, 1951? A. With reference to this case?

[785] X-Q. With reference to this case. A. November 7th, 1951, November 8th, 1951, November 9th, 1951, November 13, 1951, November 14, 1951, November 15, 1951, November 16, 1951, November 19, 1951, November 20, 1951, November 21, 1951, November 23, 1951, November 26, 1951, November 27, 1951, November 29, 1951, November 30, 1951. Do you want December, too?

[786] X-Q. Yes, December, please. A. December 5, 1951; December 6, 1951; December 7, 1951; December 12, 1951; December 13, 1951; December 19, 1951; December 26, 1951; December 27, 1951.

X-Q. And in all those entries there is no mention whatsoever of gifts or graft on Shrewsbury Street? A. That is correct.

X-Q. Now, Mr. Hurst, may I direct your attention to your diary entry of November 27? That was the conference down at the Westerly Bank? A. Yes.

X-Q. In your testimony yesterday, Mr. Hurst—this is from page 610 of the transcript, Mr. Koen—you stated preliminarily that there were four parties present, Mr. Calatrello, Mr. Garrity, yourself, and the defendant? A. Yes.

X-Q. Now, Mr. Hurst, the purpose of this conference down in Westerly was to examine the contents of that safe deposit box? A. On November 27, yes.

X-Q. And that is the first and only time in which you have ever sat down and had any conversation whatsoever with the defendant? A. To my best recollection, Mr. Maguire.

X-Q. The question [reading]

"Q. Will you tell us what you asked of Lieutenant Massei and what, if anything, he said in reply?

[787] • • •

"A. Among other things I asked Mr. Massei the source of all the money, or words to that effect, and he replied that it came from many different people at different times. Now—

"Mr. Maguire: Just—

"Q. Have you finished?

"The Court: Go ahead.

"A. I believe he also said 'Many years ago'. . . .

My recollection is that he said 'many years ago' in the same sentence.

"Q. What next happened, sir? A. Mr. Garrity interrupted or broke in with a sentence and he said that he got this money from letting liquor trucks roll down Shrewsbury Street in Worcester, in substance.

"The Court: Was the defendant Massei there?

"The Witness: Yes.

"The Court: Did the defendant Massei say anything?

"Mr. Koen: You mean following this statement by Mr. Garrity?

"The Court: Yes.

"The Witness: I don't recollect."

Now, Mr. Hurst, I direct your attention to your diary entry on [788] November 27, 1951. Is there any reference whatsoever in that diary entry to liquor trucks, gifts or graft on Shrewsbury Street? A. There is no reference to any conversations in the safe deposit vault at all, Mr. Maguire.

X-Q. Will you be good enough to read into the record, please, exactly what your entry states? A. [Reading:]

"November 27, 1951. Left Boston 8:30 a.m. with Revenue Agent Calatrello and Attorney Arthur Garrity. Arrived Westerly, Rhode Island, at 11:10 a.m. Went through William V. Massei's box with Massei present, and inventoried contents. Mr. Garrity asked Mrs. Massei, who was waiting in car outside, the origin of the deposits in the Washington Trust Company account; she thought they were dividend checks. Garrity went back to Worcester with the Masseis. Went to Worcester and gave B. Reed & Company back all their original checks and cards, and picked up invoices on Isabel Massei account. Left Worcester 3:40 p.m. and took Arthur Garrity back to Boston."

The Court: You mean you took him back to Boston?

The Witness: Yes, I did.

X-Q. Now, Mr. Hurst, will you please tell me what was the date of the so-called Isber conference? [789] A. May 20, 1952.

X-Q. Will you be good enough to turn to your diary for May 20, 1952, and tell us what your entry was for that date that pertains to this case?

The Witness: It is all about another case, your Honor, no reference to this case.

X-Q. No reference whatsoever? A. No reference whatsoever, except that I was in this building.

X-Q. How long did this conference with Mr. Isber last? A. About an hour.

The Court: The jury will have in mind in connection with memoranda that refresh a witness' recollection, whether they are prepared by him or any other person, that those memoranda are an aid to you to say whether or not under all the circumstances if the man does not need to have his memory refreshed. It is for you to say whether he does or not. The fact that a memorandum is made out is only done for the purpose of refreshing his recollection. These questions are perfectly proper about it, Mr. Maguire, on the basis of the credibility and the memory of the witness. Suppose we take a little recess now.

[Short recess.]

X-Q. Now, Mr. Hurst, you testified that in your diary on January 24th, in your diary and all of your entries in November and December, 1951, in your diary of November 27th, which is the [790] Westerly conference, and in your diary on the Isber conference, May 20th, there is no reference whatsoever to gifts, graft, and this testimony you gave about Shrewsbury Street. Now, directing your attention to the rest of your diary entries that pertain to this case, is there any reference whatsoever in any other entry which

you made in your diaries in this case to that testimony relating to gifts and graft? A. No.

X-Q. You have had a chance to examine your records thoroughly? A. These are only my diary records, Mr. Maguire.

X-Q. That is what I am getting at. A. Yes.

X-Q. Now, will you be good enough to read exactly the dates of all of the diary entries, please? Just recite them for the record.

The Court: Just the dates?

Mr. Maguire: That is all.

The Witness: I just did that, your Honor.

X-Q. No, you didn't. You did it for November and December. A. Shall I continue from December?

X-Q. Where did you start, please?

Mr. Koen: November 7th.

X-Q. Is that the opening date? A. Yes.

X-Q. I beg your pardon. Continue on, then, from January 1. [791] A. January 2, 1952; January 3, 1952; January 17, 1952; January 18, 1952; January 22, 1952; January 23, 1952; January 24, 1952; January 25, 1952; January 29, 1952; February 4, 1952; February 13, 1952; February 15, 1952; February 20, 1952; February 21, 1952; March 19, 1952; March 21, 1952; April 7, 1952; April 8, 1952; April 9, 1952; April 10, 1952; April 11, 1952; April 14, 1952; April 16, 1952; April 17, 1952; April 28, 1952; April 29, 1952; May 16, 1952; September 19, 1952; September 22, 1952; September 30, 1952.

X-Q. And that concludes your diary entries as far as this case is concerned? A. Up until a couple of weeks ago, yes.

X-Q. Now, Mr. Hurst, directing your attention to the November 27th conference down in Westerly. A. Yes.

X-Q. Did you use another memorandum to refresh your recollection as to what transpired at that conference? A. I did.

X-Q. And that is the Calatrello memorandum, so-called? A. So-called, yes.

X-Q. And when was the first time you saw that, Mr. Hurst? Was that within a week or two of the start of the trial? A. You mean when I turned in my report on this?

X-Q. Yes. A. Oh, yes.

[792] X-Q. When did you turn in your report on it?

The Court: You mean turned in the report where?

Mr. Maguire: I assume to his superiors. In this case I think it was Mr. Pastore.

The Witness: Well, I turned it in on April 28, 1952.

X-Q. Now, Mr. Hurst, directing your attention to the Calatrello memorandum, or the portion of it that refreshed your recollection as to what transpired down at the safe deposit box in Westerly. A. Yes.

X-Q. Will you please read into the record exactly what that portion of the memorandum is?

Mr. Koen: Well, my original objection stands, may it please the Court?

The Court: Is it your contention, Mr. Maguire, that in order to have the witness testify, that he has to have a written memorandum on everything? Or is it your contention that he can't have an independent memory of any circumstance?

Mr. Maguire: Well, if your Honor please—

The Court: No. Is it?

Mr. Maguire: If your Honor please, I would be very pleased to argue right here exactly what I do contend. I know you don't want me to.

The Court: That just calls for a yes or no answer.

Mr. Maguire: And if you do, I think it will put the [793] defense in an unfair position.

The Court: All right, I will leave that to the jury. Let me see the memorandum.

[The memorandum is shown to the Court.]

The Court: I will allow it.

X-Q. Will you please read it into the record? Read it to the jury.

The Court: It was made by Mr.—?

Mr. Maguire: I think it is agreed it is Mr. Calatrello's notes.

Mr. Koen: Who was present at the time?

Mr. Maguire: Who was present? Just read it into the record.

The Court: No. Who was present?

X-Q. All right, who was present? A. Mr. Calatrello, Mr. Garrity, Mr. Massei and myself. [Reading:]

"In answer to Harold's question as to the source of the funds, Massei stated the funds came from a number of diff. people."

The Court: A number of what?

The Witness: A number of diff. people.

Mr. Maguire: I think we can assume that is "different".

X-Q. Is that all? A. That is all pertaining—

[794] Mr. Koen: I don't know whether we can assume it or not. I think the witness has already testified that he said it was from different people.

X-Q. Let me ask you, Mr. Hurst, is there anything in there "at different times", as you testified yesterday? A. No, Mr. Maguire. I read—

X-Q. Is there anything in that memorandum about Mr. Garrity talking about Shrewsbury Street, liquor trucks, and getting gifts back in prohibition days? A. Of course not, Mr. Maguire.

X-Q. Now, Mr. Hurst, having in mind that this trial started on April 2, 1956, when was the first time prior to that in preparation for this trial, that you conferred with the United States Attorney's office? A. The week before, some time during the week before the trial started.

X-Q. Approximately a week before April 2d? A. Within a week before.

X-Q. On how many occasions, how many times, did you confer with them? A. Before the trial started?

X-Q. Yes. A. I don't have my 1956 diary with me, but my memory is perhaps twice, perhaps three times.

X-Q. Two or three times? [795] A. Yes.

X-Q. Now, the first time can you give us an estimate as to how long you were with them? First of all, with whom did you confer on the first visit? A. Mr. Koen the first time. About a half hour, probably.

X-Q. Anybody else? A. I don't recall anybody else.

X-Q. Now, on the second occasion, with whom did you confer? A. Mr. Koen.

[796] X-Q. Just Mr. Koen? A. I don't recall anybody else.

X-Q. This is only two or three weeks ago, Mr. Hurst. A. That's true, but in the last two weeks I have had many meetings with Mr. Koen and his associates, Mr. Maguire.

X-Q. How long did that second conference last? The first one, you said, was about a half an hour. A. Perhaps two or three hours.

X-Q. Your third conference was with whom? A. I said two or three, Mr. Maguire, didn't I?

X-Q. Yes. Do you recall whether there was or there was not a third conference? A. Perhaps only two.

X-Q. In the course of your conferring with Mr. Koen was Mr. Di Mento ever present? A. Oh, yes.

X-Q. In the course of conferring with Mr. Koen you, of course, went over the testimony that you have given here in the court in the last day or two? A. Yes, we discussed this whole matter.

X-Q. And at some time there was brought to your attention this Isber memorandum? A. Mr. Maguire, I—

X-Q. Just answer the question, if you will.

Mr. Koen: Let him answer it, please.

[797] A. It came to my attention, it wasn't brought. It came to my attention, Mr. Maguire.

X-Q. Let me understand what you mean by that. In the course of examining the file—

The Court: Let him answer it. Let him explain it.

Mr. Maguire: Well, if your Honor please, I would like—

The Court: Don't you think you ought to let him explain why he said it came to his attention?

X-Q. All right, Mr. Hurst, please tell us how it came to your attention? A. Mr. Maguire, I had not seen these files for something like four years. When I was subpoenaed I went down to Mr. Koen's office and went through all the papers that I could find with reference to this case. In going through those papers, there was a confidential memorandum, including my report and the reports of other people in connection with this case and Mr. Isber's letter was right in that file.

X-Q. In the course of examination, as I understand you, you read or came across this Isber memorandum? A. Yes.

X-Q. And you read it? A. Yes, I was given all the papers.

X-Q. Do I understand you to say you were subpoenaed to the United States Attorney's office for these conferences prior to the opening of the trial? [798] A. I first got a call from Mr. Koen without a subpoena and asking me to see him. I was later issued a subpoena and I have operated under that subpoena.

X-Q. The subpoena was for the opening day of the trial? A. No, it was a prior date. As I remember. I don't have a copy. I turned the subpoena in to the United States Attorney's office and I believe it was a prior day, but that is a matter of record.

X-Q. You did read this Isber memorandum, along with everything else in the file with this case? A. Yes, I did.

X-Q. And at some time you did have occasion to discuss

the Isber memorandum with Mr. Koen and Mr. Di Mento? A. I believe I discussed that, along with many other aspects.

X-Q. Now, will you please tell me, if you will, Mr. Hurst, who opened up the discussion on this Isber memorandum?

Mr. Koen: Oh, I am going to object to this line of questioning, may it please the Court.

The Court: No, I will exclude that. I am not going into a discussion of what took place in the office of the United States Attorney in connection with the preparation of the trial of a case except in so far as it bears upon evidence which you claim is predicated upon mistake or fabrication and if you are going to do that, you may say so and have the question, but I expect you to offer evidence—

[799] Mr. Maguire: I think the defendant's position will be clear very quickly, if your Honor please. If you will bear with me, please, I would like to pursue the examination—

The Court: I have given you as full latitude as I can but I don't want to get into a discussion of what took place in the office of the United States Attorney in connection with the preparation of the case because the United States Attorney has the right and it is his duty to do it. He is under an obligation to prepare it fairly and get it ready for a jury and I think you will agree with me that that is a fair statement.

Mr. Maguire: There is no question in the world but that he has to prepare his cases.

The Court: Anything that will show this witness has any bias or prejudice or has had any trouble with your client or shown any vindictiveness towards him, I will be happy to let you show it.

X-Q. Let me ask you this, Mr. Hurst: During the course of your preparation for the trial you learned that the Isber

memorandum was going to figure very prominently in the trial of the case against the defendant?

Mr. Koen: My objection to that.

The Court: I will exclude that.

Mr. Koen: What difference does it make?

Mr. Maguire: It makes a whale of a difference.

Mr. Koen: I object.

[800] The Court: The question is excluded and your rights are saved. Let's go along.

X-Q. But in any event you have testified, Mr. Hurst, that when you read this Isber memorandum during the course of going through the file, that was the first time you had ever seen it? A. My best recollection, Mr. Maguire. This was already out of my hands—

X-Q. I understand. Over four years before, as you have testified. Now, Mr. Hurst, as you read this Isber memorandum did you go to check back into your diaries to see whether you might have had some entries in your diaries that would bear out what appeared in the Isber memorandum? A. I checked my diaries carefully against not only the Isber memorandum—

X-Q. I just asked about the Isber memorandum.

Mr. Koen: The witness is entitled to answer, may it please the Court.

X-Q. Did you check your diary entries as against what was set forth in the Isber memorandum?

Mr. Koen: May it please the Court, may the witness be allowed to answer the previous question?

The Court: Let's have the previous question. Let's go along.

[The question is read as follows: "Now, Mr. Hurst, as you read this Isber memorandum did you go [801] to check back into your diaries to see whether you might have had some entries in your diaries that

would bear out what appeared in the Isber memorandum?"]

The Witness: Of course I did, Mr. Maguire.

Mr. Maguire: That's what we want. Thank you, Mr. Hurst.

The Court: Did you need that memorandum to refresh your recollection?

The Court [sic]: Of course I did. Four years, your Honor.

X-Q. Obviously you needed the file and the memorandum to help you to testify? A. The same as I needed all the figures and the working papers.

X-Q. A lot of water under the bridge since you closed this case, Mr. Hurst. A. Without any question.

The Court: I think that is a question and answer that may be stricken. I don't know what it means. A lot of water has gone under bridges for all of us.

X-Q. To repeat, Mr. Hurst, you, of course, found nothing in your diaries relative to what was set forth in this Isber memorandum? A. I think I have already said that, Mr. Maguire. I will say it again. I have found nothing in my diary relative to the Isber memorandum or its contents or anything to do with this case on May 20, 1952.

X-Q. Now, Mr. Hurst, isn't it a fact that at the time you made these diary entries it never occurred to you that these [802] conversations, whatever they were, that you had with Mr. Garrity relative to this Shrewsbury Street, prohibition days, gifts and graft, or the vice squad gifts and graft, it had never occurred to you that that was anything more than, as far as Mr. Garrity was concerned, just lawyer's talk and contentions?

Mr. Koen: My objection.

The Court: I will exclude that.

Mr. Maguire: Isn't—your Honor please—

The Court: No, I don't want any comment. I am ex-

cluding it. I made my ruling on that, Mr. Maguire, and I am not going to go into it. I am going to charge the jury on the theory upon which they may accept that and if the jury find that Mr. Garrity was acting as an agent, the weight of it will be for them, but I am excluding it now.

X-Q. Isn't it a fact that that was the reason why you made no entries in your diary relative to this testimony you gave yesterday?

Mr. Koen: My objection.

The Court: Mr. Maguire, I have excluded that. I don't want that question asked again, in any form. The jury may disregard any inference, either for or against the defendant, in connection with those questions. I want them to be considered—anything I exclude is excluded, and don't consider it as a circumstance against the defendant or for him. It is just out.

Mr. Maguire: No more questions, your Honor.

[803] *Redirect Examination by Mr. Koen*

Q. Mr. Hurst, with reference to the diary which was maintained and the entries which were made in your diary, sir, connected with this case, will you tell the Court and jury the purpose for which those entries were made and the extent of the entries? A. The entries were made—

Mr. Maguire: Your Honor please, frankly I welcome this because I trust you will let me get into it later.

The Court: Wait a minute. Let's have no observation because I am going to admit it, whether it is welcome or not welcome. I think it is competent on redirect. It has been opened up by you.

The Witness. Shall I answer?

The Court: Yes, sir. Do you want to have the question read?

The Witness: All right, your Honor.

[The question is read.]

A. There were several purposes for which my diary entries were made. One, from the diary I was able to compile my monthly travel voucher by putting in where I was and how many miles. Two, the diary was a record of whom I was with, in what connection, and where I was. The diary was also a place to jot down items of interest with respect to the various cases I was working on. There was no attempt on my part to use the diary for the purpose of recording everything that happened during the particular day or everything that was said during a particular day.

[804] Q. Now, sir, you have been asked several questions about your diary entry for January 24, 1952, and the testimony which you have given as to what happened on the 24th of January, 1952, in the safe deposit vault of the bank in Westerly, Rhode Island. A. I never testified I was in the safe deposit vault—

Q. November 27. I'm sorry. November 27. Coupling the diary entries which appear and which have been the subject of testimony, and the other document which Mr. Maguire has referred to as the Calatrello document, having used those, sir, to refresh your recollection, is there any question in your mind that the conversation to which you have testified took place on that date under those circumstances which you have previously described? A. No question.

Q. Now, may I have the Calatrello memorandum? [Handed.] Will you read again, sir, from that document, to the jury, the notation that is made on the last page of that series of documents, the last portion? A. [Reading:]

> "In answer to Harold's question as to the source of funds Massei stated the funds came from a number of diff. people."

Q. What question, sir, had you asked on that date? A. Asked Mr. Massei?

Q. Yes. A. The source of all the money.

[805] Q. I'm sorry, I didn't hear. A. The source of all the money. Words to that effect.

Q. And does the notation which appears on there refresh your recollection as to the answer he had made on that occasion? A. It does.

Q. And having refreshed your memory to that extent, sir, does that document refresh your memory as to whether or not a reply or statement was made by Mr. Garrity on that occasion? A. I have a recollection of a reply by Mr. Garrity.

Q. And that's the one which you have given to us yesterday? A. I have given that. Not a reply. It was not a reply. It was a statement. Because I didn't ask Mr. Garrity.

The Court: Was that made before or after Mr. Massei allegedly spoke?

A. After.

Q. Well, if there is any question as to the sequence of events, Mr. Hurst—

The Court: He said after, Mr. Koen.

Mr. Koen: Well, if your Honor please, if you are in doubt—

The Court: No, I'm not in doubt.

Mr. Koen: All right.

The Court: That is, it isn't for me to be in doubt anyway. I am not going to invade the sanctuary that is set aside for the jury.

[806] Mr. Koen: No, sir, that was not my point.

Q. Now, sir, you have been asked your diary entries for November 30, 1951. Will you refer to that, sir? A. Yes.

Q. Is there within the notes that you have made in your diary something which refreshes your memory as to any discussion with Mr. Garrity on that occasion? A. Yes.

Q. What, sir, is there in that diary as of that date that serves to refresh your memory? A. Do you want me to read it, Mr. Koen?

Q. Read that portion which you say refreshes your memory. A. [Reading:]

"Arthur Garrity came in at about 3:00 p.m. Conference with him and Calatrello. He still argues Massei had $85,000 as of December 31, 1945. Asked him for official police record of Massei, for two statements missing Worcester County Trust account. Again asked him to bring in Massei for sworn or oral statement and let him look at list of routine questions. Asked him for data Massei vacations, gifts to relatives, etc. He will get all that for me."

Q. Is that, sir, the entry which you say refreshes your recollection as to the conversation with Mr. Garrity which was the subject of your testimony yesterday? [807] A. Yes.

Q. Mr. Hurst, in the course of your examination and investigation, did you find any evidence that Lieutenant Massei could not have had any large amounts of cash during the period 1946 to 1950, inclusive? Yes or no.

Mr. Maguire: If your Honor please,—

Q. Yes or no?

Mr. Maguire: —that evidence speaks for itself, the evidence in the case does, and it's certainly for the jury.

Mr. Koen: I pray your Honor's judgment.

The Court: Well, now, will you come up. Let's come up here and we'll discuss it under circumstances where no one will be heard.

[Conference at the bench, during which the following is recorded:—

Mr. DiMento: That case, your Honor, was the Friedberg [handing]. That is one of those four cases that you referred to. And I refer to the second paragraph there [pointing].

The Court [after perusing]: What was the question? [Last question read.] "Could not have had"? That calls for a conclusion, Mr. Koen.

Mr. Maguire: That's right.

Mr. DiMento: Your Honor, that question was asked with the Friedberg case in mind. That [808] is the Supreme Court case and it came down with the other three cases.

The Court: I think on form that ought to be excluded. That isn't the way it ought to be. I'm going to admit the substance of it, see.

Mr. DiMento: The question has been asked on cross examination—

The Court: That question doesn't ask if he got credit for any cash. I don't exclude that.

Mr. Koen: I haven't asked that.

The Court: What?

Mr. Koen: I haven't asked that. I have asked this question based on the cross examination which Mr. Maguire has conducted.

The Court: Will you read me the question again?

[Question again read.]

Mr. Maguire: That's a conclusion.

The Court: "Could not have had"—what do you mean by that, Mr. Koen?

Mr. Koen: That is in effect asking him for his analysis of the cash.

The Court: What you want to do is to show he found nothing which would show he had cash?

Mr. Koen: On the contrary, I would like to [809] show conditions existing which would sufficiently rebut the contention of the defendant, of Mr. Garrity, that this was cash on hand back in 1945.

The Court: Now, is this in rebuttal of anything that was brought out?

Mr. Koen: Oh, I think so.

Mr. Maguire: I don't think that it was brought out at all.

Mr. DiMento: The series of assumption questions, as you will remember.

Mr. Maguire: That was corrected at—

The Court: Well, I'll allow the question to be answered, and I will give you full opportunity for cross examination and save your rights.

Mr. Koen: Well, in that form, your Honor?

The Court: Yes.

Mr. Maguire: Note my objection.]

The Court: All right.

Mr. Koen: Will you wait just a minute, sir.

[A pause.]

Mr. Koen: May I withdraw that question for the moment, sir, and go forward.

Q. Mr. Hurst, you were asked a series of questions with reference to the net worth compilation, the compilation of the net worth of Mr. Massei through the calendar years 1946, '47, '48, [810] '49, and '50. Is that correct? A. Yes.

[811] Q. And the questions, as asked by Mr. Maguire, were predicated upon certain assumptions; do you remember that? A. Yes.

Q. Now, sir, you testified in answer to those questions; is that correct? A. Yes.

Q. And in the course of that testimony you reached a conclusion as to the net worth of this defendant predicated on the information that you had and the investigation that you made; is that correct? A. Yes.

Q. All right, sir. Now I ask you, from that investigation and having in mind the examination, as conducted by Mr. Maguire, and from your investigation did you find any evidence that Lieutenant Massei could not have had any large amounts of cash during the periods 1946 to 1950, inclusive?

Mr. Maguire: My same objection, your Honor, as calling for a conclusion of the witness.

The Court: That's right. I am allowing it.

A. I found indications, Mr. Koen, if that is what you mean.

Q. Yes. Tell us what those were, if you will, please, sir. A. First, there were withdrawals from savings banks so that the total amount as of December 31, 1945 of $16,006.30 was reduced through these withdrawals through 1946, 1947 and 1948 to a low of $3,799.20. Another indication was the sale of securities in [812] a prior year so that as of December 31, 1945 there was no securities balance in the net worth.

Q. When, sir, were those securities sold? A. In 1945.

Q. All right, sir. A. There was also the cashing in of savings bonds in the amount of $1,800 during 1948, and the using of that money. There were also loans payable during the years 1948, 1949 and 1950. In 1948 a loan was taken out from the Worcester County Trust Company on a collateral loan and that was not paid off during 1948, 1949 or 1950. Only interest was paid. In addition there was a passbook loan made as of the end of December, December 31, 1947 in the amount of $1,255.94 to finance the purchase of securities, as I recollect. There was also a loan made from the Worcester Police Credit Union in the amount of $600 during the year 1950.

Mr. Koen: That's all.

Re-cross-examination by Mr. Maguire

X-Q. For whatever your testimony is worth, Mr. Hurst,—

Mr. Koen: I pray your Honor's judgment.

The Court: No, no. The jury will disregard that.

X-Q. I will call your attention, Mr. Hurst, in 1950 there was a loan receivable of $4,500. A. From Edward Massei, yes.

X-Q. And the real estate keeps going up in each of these years? A. Oh, yes.

[813] X-Q. Mr. Hurst, in reference to the reasons why you keep your diary, you state one of the reasons was that you jot down items of interest. Would you please get your diary entry for the Westerly conference? A. Yes.

X-Q. Will you read from your original diary while I use your memorandum, please? A. Surely. November 27. Tuesday. 1951.

X-Q. Very good. Now, you testified that Mr. Garrity stated that he got this money by letting liquor trucks roll down Shrewsbury Street in Worcester, in substance? A. That's right.

X-Q. I take it you did not consider that an item of interest? A. It wasn't novel to me.

Mr. Koen: What was that answer?

Mr. Maguire: It wasn't novel.

X-Q. As a matter of fact it was never noted as an item of interest in any of those diary entries, was it, Mr. Hurst? A. I have already told you that.

X-Q. That's right, and at the same time you did consider it of interest that Mr. Garrity rode home with you from Worcester, is that correct? A. That's correct. At that time it was apparently of interest to me. I put it down there.

X-Q. And it was also of interest to you that you had gone to [814] B. Reed and Company to turn back all their original checks and cards and pick up invoices on Isabel Massei's account; that was an item of interest to you? A. No, Mr. Maguire. I stated when I went into the purposes of the diary, I put down what I did, if I remember correctly. That is what I did.

X-Q. At least it was never of interest to you that Mr. Garrity had made these remarks, it wasn't of sufficient interest to have you record them in your diary? A. I said it wasn't novel.

X-Q. Referring to your diary entry of November 30, and this apparently, as I understand, is the only reference in

any way to—even indirectly—to these statements of Mr. Garrity, you state— A. In the diary, Mr. Maguire.

X-Q. I understand that. We are limiting our questions to the diary. "He still argues that Massei had the money prior to 1945." A. Yes.

X-Q. Isn't it a fact, Mr. Hurst, that every time Mr. Garrity raised this subject or whenever it was discussed with you, that he was in effect arguing the point?

Mr. Koen: I pray your Honor's judgment.

The Court: No. I will exclude that.

Mr. Maguire: That's all. Is it time for lunch, your [815] Honor?

Mr. Koen: May we suspend here until 2:15, sir?

The Court: Come back at quarter past two.

[Luncheon recess.]

[816] AFTERNOON SESSION

JOHN P. RYAN, Sworn

Direct Examination by Mr. Koen

Q. What is your name? A. John P. Ryan.

Q. Where do you live? A. 15 Glastonbury Oval, Waban.

Q. And by whom are you employed? A. U. S. Government, Internal Revenue Service.

Q. In what capacity, sir? A. Chief Audit Division, District Director Internal Revenue Office.

Q. Will you describe to the Court your duties? A. I am responsible for the supervision and coordination of audit functions under the District Director.

Q. And included among your duties, sir, are you the person who would have custody and control and with whom are filed powers of attorney ultimately? A. Yes, sir.

Q. At my request, sir, did you make an examination of

the files in your division within the past week or so? A. I did.

Q. With reference to a power of attorney in the case of William V. Massei? A. I did.

[817] Q. Will you tell the Court the nature and the extent of the search that was conducted by you and those employed by you in the audit division? A. Under my supervision a thorough search was made of the particular file drawers where the powers of attorney were maintained, and also the card index file that is maintained along with the powers of attorney.

Q. And after the search that was conducted by you and those under your supervision and direction, was a power of attorney found in connection with the tax matter of William V. Massei? A. No, sir.

Mr. Koen: That is all.

Mr. Maguire: No questions.

CHARLES J. ISBER, Sworn

Direct Examination by Mr. Koen

Q. What is your name, sir? A. Charles J. Isber, I-s-b-e-r.

Q. And where do you live, sir? A. 24 Concord Avenue, Cambridge, Mass.

Q. And what, sir, is your profession? A. I'm a lawyer.

Q. And how long have you been practicing as an attorney? A. Since 1923.

Q. At one time, sir, were you connected with the Bureau of Internal Revenue in a legal capacity? [818] A. Yes, sir.

Q. For what period, sir? A. I was Treasury counsel from 1942 to 1953.

Q. And what were your duties, sir? A. My duty was to determine on the basis of the reports of the agents submitted to me as to whether or not I would recommend criminal prosecution against a taxpayer.

Q. Now, sir—

The Court: Were you in the service before '42, Government service?

The Witness: No, your Honor.

The Court: That's the beginning? That was the beginning?

The Witness: In August, 1942, I was in Washington.

The Court: You mean you started in Washington and were transferred to Boston?

The Witness: Yes, sir. Yes, your Honor.

Q. Were you familiar, sir, with the pertinent statutes and regulations covering appearances of attorneys before the Treasury Department? A. Yes, sir.

Q. And were you familiar with the procedures that were followed within the Department with reference to tax matters? A. Yes, sir.

Q. And as part of the procedure set up, sir, whether within [819] the, or at the level of, counsel, was a conference provided? A. Yes, sir. We would afford taxpayers and their counsel an opportunity to appear before my office if they requested a conference.

Q. Did there come a time, sir, when you afforded a conference in the case involving Lieutenant Massei? A. Yes, sir.

Q. Can you tell us, sir, at whose request the conference was held? A. At the request of Attorney Mr. Garrity.

Q. Can you tell us, sir, when that conference was held? A. May 20, 1952.

Q. I show you this document if you wish to look at it to refresh your memory [handing].

The Court: Could I see counsel for a minute in connection, not with Mr. Isber's testimony, but another matter?

[Conference at the bench, during which the following is recorded:—

The Court: One of the difficulties here is the fact that these figures have been on the blackboard and they have been used as evidence, and, to be frank, there is an underlying mandate, as I read the Holland case, to exercise a great deal of diligence. Mr. Koen has made the request he be allowed to make a photostatic copy of these [820] figures. I thought I would see counsel. I made it clear I don't think this board should go up to that jury room.

Mr. Maguire: I agree.

The Court: You don't object to a photostatic copy being made?

Mr. Maguire: I certainly do, your Honor; very definitely so.

The Court: Well, I'm disposed to do it.

Mr. Maguire: If your Honor please, first of all,—

The Court: It will take some time to get it ready. I meant to tell Mr. Koen about it this morning.

Mr. Maguire: First of all, I think Mr. Koen's request applied only to the computations of the taxes which were to be set.

Mr. Koen: No, no. My request was twofold: one, as to net worth, and the other, the computation proposition.

The Court: What I am anxious to do is to have the case prepared for the Circuit Court of Appeals if there should be a verdict, you understand?

Mr. Maguire: Yes, I do. It is all in the [821] record now, if your Honor please.

Mr. Koen: Apparently I was in error. I thought I had made the request both—

The Court: No, I understand. If you want to make a photostatic copy, I am disposed to let you have it.

Mr. Maguire: If your Honor please, let me enter my strenuous objection on the part of the defendant.

That doesn't run contrary to what you—

The Court: If you take a photostat, you could do either one of two things. You can have a chance to think it over Monday.

Mr. Maguire: I won't change my position. I think it is clearly objectionable, your Honor. Everything on that is in the record, if your Honor please—everything.

Mr. Koen: Not everything.

Mr. Maguire: Yes, sir.

Mr. Koen: Oh, no. There were some things—

Mr. Maguire: Everything on there is in evidence.

Mr. Koen: No, it isn't.

The Court: You may make arrangements to have a copy made, photostatic copy, and Monday I'll rule on it. You expressed a desire to have [822] it. We'll take the first step on the journey, Mr. Koen, by having it photostated. It won't disturb the setup as it is, will it?

Mr. Koen: No, I can take it probably from the original.

The Court: That is right.]

Mr. Koen: May I proceed?

The Court: Oh, certainly. [To jury.] This conference at the bench was on a matter entirely different, having no relationship to the testimony of Mr. Isber in the least. Just another detail I meant to take up with counsel this morning. Go ahead, Mr. Koen.

Q. I think you told us, sir, the conference was held on the 20th of May, 1952? A. Yes, sir.

Q. Can you tell us where it was held? A. In this building, on the tenth floor. We had our office here then.

Q. And what was the subject of the discussion, sir? A. The subject under discussion was the case of the defendant, Mr. Massei.

Q. Who was present, sir? A. Mr. Garrity and Mr. Hurst, Harold Hurst, who testified this morning.

Q. And yourself? [823] A. And myself.

Q. And was there a stenographer present? A. There was not.

Q. Can you tell us, sir, whether or not during the conference notes were made by you? A. My memory is I did make notes at the time.

Q. And can you tell us whether subsequent to that you did anything with reference to the notes which you took during the conference? A. From the notes, after the conference was over, I dictated a summary of what transpired at the conference; what Mr. Garrity said, what I said, and, if anything, what Mr. Hurst said, whom I invited to attend the conference.

[824] Q. Can you tell us, sir, whether the dictation was made during the day of the 20th or the 21st? A. I could not. It is dated the 21st. I could have dictated it that afternoon, depending upon the time, or the first thing next morning.

The Court: May I interpose? Would you please move the blackboard?

[The blackboard is moved to one side.]

Q. I have shown you a document, sir. That is a three-page document. Will you turn to the third page, sir? A. Yes, sir.

Q. Is there a signature upon that page? A. Yes, there is.

Q. And the signature which appears? A. Charles J. Isber. My signature; my writing.

Q. After you signed that document, sir, what did you do? A. I gave it to my secretary to put in the file, in the Massei file.

Q. Do you have any memory now, sir, as to when next you saw that document following the action of your secretary? A. I have no memory as to having seen it since then.

Q. Until when, sir? A. Until it was shown to me by your office, which was after I received a summons to appear here.

Q. And when was that, sir, as near as you can remember?

[825] A. Well, I don't remember the date, but my summons is dated April 2nd, 1956.

Q. All right, sir. Is it fair to say from the time that memorandum was made, at least until April 2, 1956, you did not see that memorandum again? A. Yes, sir. I did not.

Q. Now, using that memorandum, sir, to refresh your recollection, first of all will you read the document to yourself, sir? A. I have looked it over.

Q. Does it refresh your memory as to what happened on the 20th of May, 1952? A. Yes, sir.

Q. All right, sir. Will you tell us what happened at the conference on May 20, 1952, using, as you go along, if you need, the document to refresh your memory? A. I remember the substance without the document, but with respect to dates I—exact dates, I have to refer to this document.

Q. All right, sir. A. Mr. Garrity, attorney Garrity—

Q. Let me interrupt you, sir. I'm sorry. You stated that you were aware of the statutes and the regulations, sir, with reference to the appearance of attorneys before the Treasury Department? A. Yes, sir, I am supposed to be.

[826] Q. What's that? A. Yes, sir.

Q. Did you, sir, as counsel or of counsel for the Bureau of Internal Revenue, have those statutes and regulations in mind when conferences were arranged? A. Yes, sir.

Q. Did you, sir, have a custom and practice before conferences were held to determine whether powers of attorney or enrollment cards had been presented and filed? A. Yes, sir.

Q. And in the event no such power was filed or no such enrollment displayed, would a conference have been granted? A. It would not. I would advise the attorney under the Treasury rules that an attorney was not allowed to appear unless he had a power of attorney.

Q. Back to the memorandum, if you will, and tell us what the discussion was. A. Attorney Garrity came in to see me and evidently I called Mr. Hurst, inviting him to come in, so he was present. Mr. Garrity stated that the taxpayer was retired from the police force as of the date of the conference and that he was not—although he wasn't in the best of health, he was at present building his home.

He said that his client had been attached to headquarters squad where he had about five men under him and it was [827] the vice squad; that he was attached to this vice squad from April of 1932 to March of 1933 and that in 1934 he was back on the vice squad again until 1936; that he was removed from the vice squad but returned to the vice squad in January of 1938 and remained there until June of 1943.

Mr. Garrity further stated that the taxpayer had been a sergeant in charge of the vice squad and, as a sergeant in a vice squad, was in a position to obtain gifts or graft; that he was the number one man responsible for gambling supervision in Worcester.

Mr. Garrity continued giving me something of the background of the taxpayer, stating that from June of 1943 until 1951 Mr. Massei was doing personnel work such as instructing police and having charge—and licensing board duties. Licensing board duties was from June of 1947 to October of 1949; that the licenses related to supervision of licenses for taxis and peddlers. In response to a question from Mr. Hurst, Mr. Garrity stated that the licensing duty did not relate to liquor.

Mr. Garrity emphasized, stated, that the Attorney General of Massachusetts—

Q. No, no.

The Court: No.

A. The attorney stated that the taxpayer was promoted to become a police lieutenant in September of 1947; that he had [828] been in a serious motorcycle accident in 1931; that on his retirement from the police force, showed that he had an excellent record as a police officer.

The attorney, referring to Mr. Garrity, pointed out that the taxpayer lived like a pauper and was therefore able to accumulate enough money prior to 1947; that the taxpayer earned less than $3,000 a year during that period.

Mr. Garrity further states—stated—that the taxpayer had told him that he received gifts from many people and that during prohibition while the taxpayer was on the vice squad every truck loaded with liquor that passed through the main street of Worcester would make a gift to the taxpayer and that the taxpayer believed that the gifts were not income and therefore were not reported as such.

Mr. Garrity further stated that the taxpayer cooperated with the agents—

The Court: No, please.

A. [Continued] I asked Mr. Garrity why the taxpayer paid large sums of money for insurance in cash and he replied that a smart insurance salesman persuaded the taxpayer and several others that this was a good way to hide cash and that—in substance, his reason for that.

Q. Wait a minute. [Brief pause.] What else did Mr. Garrity say at that time in connection with the insurance? A. Well, a good way to hide cash would be by buying insurance [829] and that also nobody but himself would know about payments, not even the insurance company employees, and that cash—if he kept cash at home it could be lost in case of fire or in case he was robbed and in this

way nobody could discover the possession of this large amount of cash.

Q. Now, sir, this may be in the form of a leading question, may it please the Court, but I am trying to avoid a portion of the memorandum that you have previously excluded—getting down to that portion of the discussion that dealt with February, 1949, sir, will you tell us what was said at the conference by Mr. Garrity? A. He stated that in February of 1949 Mr. Massei obtained—I have here—I don't know the amount of dollars but I have X dollars, after the death of his father, who had haved a lot of cash as a result of his father's partnership in a tavern which was engaged in illegal sales of liquor. Special Agent Hurst stated that he could not find an inventory of his father's estate and that Mr. Massei's brother, who was a co-legatee, didn't get—got about $600 from his father. Mr. Garrity stated that the executor told him that the taxpayer's father had money and that the younger brother was not as close to the father as Mr. Massei.

Q. Now, Mr. Isber, in view of the Court's prior ruling, will you confine yourself to the subject that is discussed in the last sentence of that document? On the conversation that the last sentence reflects? [830] A. Well, Mr. Garrity stated that the source of income was gifts or graft or bribes and that these funds were obtained before 1945 and that Mr. Massei should not be prosecuted for tax frauds just because the taxpayer was a dishonest cop and it was not the province of the Treasury to police the morals of the taxpayer.

The Court: You don't object to that, do you, Mr. Maguire?

Mr. Maguire: Do I what?

The Court: I let that latter part go in yesterday or this morning after I had excluded it, only because you said you wanted it.

Mr. Maguire: Other than my continuing objection to all these alleged admissions, your Honor.

The Court: But I am asking you a direct question. You don't object to that latter statement going in?

Mr. Maguire: No, I do not. Having in mind my initial objection to the whole subject matter.

Mr. Koen: I have no further questions of this witness.

Cross-examination by Mr. Maguire.

X-Q. Mr. Isber, as I understand it you were Assistant District Counsel? A. Yes, sir.

X-Q. And as I understand your testimony correctly, it was your job to pass on the legal sufficiency of the evidence in the case [831] against Mr. Massei? A. Substantially, yes.

X-Q. And the Treasury Agent or the Intelligence Agent forwarded to you their file, they having completed their investigation? A. They would send us their reports of the result of their investigation, with the evidence.

X-Q. Now, in terms of this conference on May 20, how long did it last? A. It is hard for me to remember. I wouldn't say very long. I really have no memory and I didn't specify the time of beginning and end of the conference.

X-Q. Not to pin you down, Mr. Isber, but was it an hour or two hours? Mr. Hurst, I think, said it took about an hour. A. He said about an hour and I wouldn't want to say that was wrong. An hour, I would say that is substantially correct.

X-Q. There was no stenographer present? A. No.

X-Q. And during the conference you made notes? A. I made notes.

X-Q. I wonder if you would tell us, Mr. Isber, just how extensive this note taking was? A. The note taking was not extensive.

X-Q. Well, would it be fair to say as the conference went along and you talked, you would make little jottings to jog your memory when it came to dictate the memorandum; is that about it? [832] A. I think that is a correct statement.

X-Q. And the proceedings, Mr. Garrity in his conversation, did he speak extemporaneously or did he read statements to you? A. My memory is that he spoke extemporaneously.

X-Q. It was rather an informal conference? You sat around your desk and talked back and forth? A. Very informal.

X-Q. When you came to dictate the memorandum, Mr. Isber, whether it was later that same day or the next morning, you had the agent's file, I assume, and used that, as well, or did you use the agent's to help you with the dictation? A. My memory is that I didn't. I relied on my notes and my memory of what transpired.

X-Q. But in any event you never saw this memorandum again until April 2nd, 1956 or shortly thereafter? A. That's correct, whatever the date really is. I don't know.

X-Q. And you had a conference with Mr. Koen and Mr. Di Mento about that? A. No, I can't say I had a conference. I talked to Mr. Koen fleetingly a couple of times but I wouldn't call it a conference.

X-Q. Did you ever say— A. And I didn't speak to Mr. Di Mento about it at all.

X-Q. Did you ever see a power of attorney in this case, Mr. Isber, that you can recollect? A. I can't recollect seeing a power of attorney. One way or [833] another.

X-Q. You certainly can't help us as to—we are all assuming, of course, that a power of attorney was filed, Mr. Isber,—

Mr. Koen: I pray your Honor's judgment.

Mr. Maguire: Well—

Mr. Koen: The Court has made a ruling on that aspect of the case.

Mr. Maguire: I didn't think there was any dispute—

Mr. Koen: It is ultimately a question for the jury.

The Court: That's right. Well, what is a question of fact for the jury is what I said it was.

X-Q. What I am getting at there, you can't help us at all, obviously, as to what the contents of the power in this particular case was? A. I don't recall ever giving a power of attorney any thought one way or the other.

The Court: I have ruled that the ultimate question of the authority of the agent, Mr. Garrity, to make admissions binding the defendant, Mr. Massei, was for the jury under proper instructions which I will give at the time.

X-Q. Now, during the course of the conference did Mr. Garrity cite to you what he thought were applicable decisions?

Mr. Koen: My objection.

The Court: I will exclude that.

Mr. Maguire: I'm sorry, your Honor?

[834] The Court: I have excluded it.

Mr. Maguire: I would like to make an offer of proof, your Honor.

[Conference at the bench:

Mr. Maguire: The witness, in answer to this question, would testify that Mr. Garrity did, at this conference, cite numerous cases which he felt were applicable, all bearing toward the requirement that the government has to prove source and the years in question.

The Court: I will exclude it.]

The Court: Unless it is by agreement I am going to follow the rule I have followed during this trial steadfastly, all contentions and arguments certainly do not come as a matter of law within the basic principle that I have enunci-

ated. That's what I ruled. I have tried to keep it out and several times it has gone in, even after I excluded, only because you did it, Mr. Maguire. The record will show that abundantly.

[835] X-Q. Well, now, Mr. Isber, do you have any memory of Mr. Garrity stating to you as follows:—Assume there was a good deal of graft back in prohibition days, and supposing that Massei did receive some of it: what of it? That's no basis for charging him with tax evasion 25 years later. Do you recall Mr. Garrity saying anything to you similar to that during the course of this conference? Have you any memory of his saying something like that to you?

The Court: You object?

Mr. Koen: I do object.

The Court: I exclude it. When I exclude something, Mr. Foreman, ladies and gentlemen of the jury, I know you will disregard it entirely.

Mr. Maguire: Will your Honor hear me at the bench?

The Court: It will be the same offer of proof, won't it?

Mr. Maguire: No, your Honor, it's quite different.

The Court: All right. I'm excluding it.

Mr. Koen: I withdraw my objection. Go ahead and ask the question.

X-Q. Would you like the question read again, Mr. Isber? A. Yes, would you, please?

Mr. Maguire [to reporter]: Will you read it, please, Mr. Martin.

The Court: I want it recorded, sitting here as the Judge, I have some solicitude for the fundamental rights of [836] both parties, and I want to have it recorded here so if it ever becomes a question for the consideration of any appellate court afterwards that I have interposed my sound objection. I am doing it only because counsel want it. I have no desire to harm anybody unnecessarily.

Go ahead, Mr. Maguire.

Mr. Maguire: Will you read the question.

[The following question is read:

"Well, now, Mr. Isber, do you have any memory of Mr. Garrity stating to you as follows:—Assume there was a good deal of graft back in prohibition days, and supposing that Massei did receive some of it: what of it? That's no basis for charging him with tax evasion 25 years later. Do you recall Mr. Garrity saying anything to you similar to that during the course of this conference? Have you any memory of his saying something like that to you?"]

X-Q. Have you any memory of his stating that previously? A. I don't have any memory—I don't want to quibble about the use of words. If you mean by that whether there was a possible hypothetical situation, it could well have been; but I can't remember words like "assuming" in the contents of that language.

X-Q. At least, Mr. Isber,—

[837] Mr. Koen: Now I ask that answer be stricken.

Mr. Maguire: If your Honor please,—

X-Q. At least, Mr. Isber,—

Mr. Koen: Wait a minute, please, Mr. Maguire. I have a motion before the Court.

The Court: The answer may be stricken.

Mr. Maguire: Will your Honor hear me at the bench, please?

The Court: It's not responsive to your question, Mr. Maguire, that's all.

X-Q. Mr. Isber, let me ask you this question. Do you have any memory as to whether Mr. Garrity said those words or not? A. What, the words—

X-Q. The question that Mr. Martin read to you. A. I couldn't say that I have.

X-Q. Do you have any memory, Mr. Isber, that Mr. Garrity did not state those words? A. No, I can't, in all

fairness, say that, either. I don't have any such memory that he did not.

X-Q. During this conference, Mr. Isber, do you have any memory of Mr. Garrity stating to you the following? Suppose Massei was in position to receive gifts or graft up to 1943: what if he did? Your charge against him relates to the period from 1945 to 1950. Do you have any memory of Mr. Garrity making such statements to you? [838] Mr. Koen: Now—

A. Not in that form.

Mr. Koen: Wait a minute, please.

The Witness: I beg your pardon.

Mr. Koen: I think the whole proposition is hypothetical, may it please the Court.

Mr. Maguire: There will be evidence of this, if your Honor please.

The Court: You withdrew your objection.

Mr. Koen: This is another question.

The Court: It's the same in substance, isn't it?

Mr. Maguire: That's correct, your Honor. The first question related to the liquor trucks. This is related to his position on the Vice Squad.

X-Q. Is it that you don't have any memory about that; is that it, Mr. Isber? A. I'm sorry, I lost the distinction in the two questions.

X-Q. I asked, in response to my last question, do you have any memory of Mr. Garrity stating to you the substance of what I have just recited? A. Some portion of that, I'd say yes, he did say something about the Vice Squad and the period prior to 1943 or '5, or whatever the year may be. That I recall, and I have that in mind.

The Court: Do I understand, Mr. Maguire—don't [839] misunderstand me now. I'm doing this with perfect frankness to both parties. What you desire to get is evidence, not to show what the contentions were, but to show that

there were contentions on the theory that if there were contentions by Mr. Garrity it's for the jury?

Mr. Maguire: Exactly, your Honor.

The Court: I'll permit it.

Mr. Maguire: That's exactly what I'm trying to get at.

The Court: All right. That comes within the orbit of what I said before.

Mr. Koen: I understand, sir.

X-Q. Now, Mr. Isber, do you recall Mr. Garrity stating to you in the following terms: Consider the logic of the situation. If there are any gifts or graft in this picture, they are many years before the prosecution period and should not be used by you against my client? A. That was his chief argument at the conference.

X-Q. Do you have any memory as to this, Mr. Isber? "Assume that the Government file"—this is Mr. Garrity talking. A. Yes.

X-Q. "—contained circumstantial evidence which may make it seem that Massei violated his duty as a law enforcement officer. If it does, that neither requires nor justifies prosecution for tax evasion."

[840] The Court: Is it your position that Mr. Isber was the person that was charged with prosecuting violations of the statute? Isn't that set aside for the United States Attorney?

Mr. Maguire: If your Honor please,—

The Court: These bureaus police, they represent the police force of the Federal Government.

Mr. Maguire: If your Honor please, I want to make as clear as I can—

The Court: I don't want to have the jury get confused on the question.

Mr. Maguire: No, it has nothing to do with Mr. Isber's function in passing on this. What I want to do is to make clear the atmosphere, the tone, the words recited by Mr.

Garrity when these what I allege were arguments to Mr. Isber.

The Court: Let me ask you this, Mr. Maguire. Is it your position these letters were put in, which have been testified to, containing these detailed stories about which Mr. Hurst spoke and almost wholly predicated his figures on, that those letters, for the record, were letters that were only contentions and did not—

Mr. Maguire: No, if your Honor please, they stand on quite a different footing.

The Court: Well, listen, that's for the jury.

Mr. Maguire: I understand, your Honor. No, as you may have—

[841] The Court: That's for the jury.

Mr. Maguire: No, the only objection—

The Court: That is one of the philosopies behind, I assume, the Government's claim, and that's what I'm going to charge the jury on, and I don't want to go into it now.

Mr. Maguire: Those letters there is no question about. They are admissible as admissions of the defendant, your Honor.

X-Q. Mr. Isber, trying to sum up the nature of this conference with Mr. Garrity, is it fair to describe what transpired during this hour conference as a legal argument by Mr. Garrity in behalf of defendant, trying to persuade you, representing the United States, that the case did not warrant criminal prosecution?

Mr. Koen: My objection.

The Court: I'll exclude it.

Mr. Maguire: Thank you, Mr. Isber.

Mr. Koen: Just one moment, please.

The Court: Tell me, Mr. Isber, was this hearing conducted in the same manner as all hearings were conducted before you?

The Witness: This was a hearing—

The Court: Just like all other hearings?

The Witness: Usual run of the mill.

The Court: There was nothing out of the ordinary about it?

[842] The Witness: Nothing out of the ordinary about it.

X-Q. Conducted the same as all the others? A. Conducted the same as all the others.

X-Q. And you didn't know the taxpayer? A. I never saw the taxpayer.

Redirect Examination by Mr. Koen.

Q. Now, Mr. Isber, you have been asked a series of questions which have been preceded by the word "assume" or other words of similar import. Tell me this. With reference to the statement that you have made after reading that report, particularly directing your attention to the words "graft" and "bribes" as used by Mr. Garrity on the 20th of May, 1952, sir, is it your memory now that those were statements made by him of facts, or were they predicated on a hypothesis? A. I have them here as statements of fact.

Q. That is your best memory, sir? A. And I can, in fairness to Mr. Garrity as counsel in the case, I should add that I—he argued from those statements—

Q. No.

Mr. Maguire: If your Honor please, let the witness speak and answer the question.

A. [Continued.] Those are statements of fact which I—

The Court: The only thing Mr. Koen asked him was whether—

Mr. Maguire: If your Honor please!

[843] The Court: No, please! The last answer was in no way responsive to the question of Mr. Koen. Mr. Koen's, the Assistant United States Attorney's, question has been

answered fully, and the latter part of that is not responsive to anything, and I give you the right to re-examine him.

Q. Your answer to the last question is what?

The Court: Would you read Mr. Koen's question and the answer, Mr. Martin, so I will have it correctly?

[The reporter reads the following:

"Tell me this. With reference to the statement that you have made after reading that report, particularly directing your attention to the words 'graft' and 'bribes' as used by Mr. Garrity on the 20th of May, 1952, sir, is it your memory now that those were statements made by him of facts, or were they predicated on a hypothesis?

"Answer: I have them here as statements of fact.

"Question: That is your best memory, sir?"]

The Court: What was the answer to that?

[The reporter reads the following answer:

"And I can, in fairness to Mr. Garrity as counsel in the case—"]

The Court: I am going to exclude that. The question "Is that your best memory?" calls for an answer Yes or No.

[844] *Recross Examination by Mr. Maguire:*

X-Q. Now, Mr. Isber, after your Yes or No answer to Mr. Koen's question, do you have something further to add? A. Well,—

The Court: Oh, no, no, I'm letting you put it in the form of a question. I've excluded that question because it is not responsive to any question asked by the prosecutor. Now, Mr. Maguire, you may ask him any questions you want to. I won't limit you on recross. Go ahead. Whatever you like to do is all right.

X-Q. Mr. Isber, you stated, or in the question of Mr. Koen, the answer to that, you stated that as far as your

memorandum is concerned, it sets it forth statements of fact.

The Court: No, I beg your pardon. Now let's get that right.

Mr. Maguire: Would you please read that question again, Mr. Martin?

The Court: He said that was statements of fact in connection with certain phases, that's all. Isn't that right, Mr. Koen?

Mr. Koen: That was the purpose, the import of my question.

The Court: There are other things in that memorandum that I have definitely excluded, I wouldn't permit come into the trial of the case, but I am going to have read in this as given so that any appellate court, if it becomes necessary, can [845] know what I have excluded.

Mr. Maguire: Then may I have—

The Court: They would be highly inflammatory, and I have excluded them, Mr. Maguire, because I'm protecting your client.

Mr. Maguire: Well, your Honor, I appreciate that very much.

The Court: I mean the other part that I have excluded. I wouldn't let them go in even if counsel, both counsel, asked me. That I will not let go in, and I'm putting it in the record.

Mr. Maguire: Your Honor, may I ask that Mr. Martin read aloud the question which Mr. Koen put to this witness?

The Court: I had it read and he gave the answer.

Mr. Maguire: If your Honor please, that part of it—

The Court: That's right, I'll do it. Read it again, Mr. Martin.

[The reporter reads the following:

"Tell me this. With reference to the statement that you have made after reading that report, particularly

directing your attention to the words 'graft' and 'bribes' as used by Mr. Garrity on the 20th of May, 1952, sir, is it your memory now that those were statements made by him of facts, or were they predicated on a hypothesis?

"Answer: I have them here as statements of fact."]

[846] The Court: Have you used that memorandum in front of you, Mr. Isber, to refresh your recollection so you are able to testify from your memory as it is refreshed from that memorandum and not from the memorandum itself?

The Witness: I remember the substance of the conference. There are certain portions in it—

The Court: No, no, did you use it?

The Witness: It did refresh my memory as to what transpired.

X-Q. Well, were these statements that you have testified to, Mr. Isber, as it actually transpired at the conference,—were they statements of fact, or were they predicated by Mr. Garrity on a hypothesis? A. It was a mixed—they were both.

X-Q. Will you please explain. A. At one point it appeared with respect to the question of cars and vice as a pure statement of fact; and on the last page when, for instance, Mr. Garrity said that the Treasury should not police the morals of the taxpayer, I don't regard that as a statement of fact. For that reason I am compelled to state that there were statements of fact and there were arguments of counsel.

X-Q. And that's the way the whole conference went? A. I wouldn't say the whole conference, but that was part of the content of the conference.

[847] Mr. Maguire: That is all, your Honor.

Redirect Examination by Mr. Koen.

Q. Well, do I understand you clearly that this document refreshed your recollection to the extent that the statements that you previously testified to on redirect by me were predicated on facts or were received by you as a statement of facts and are to be regarded in that category? A. Substantially, yes.

Q. And do I understand from the question of Mr. Maguire's which you just answered that, following those statements of fact, arguments and discussions were made predicated on that fact as stated? A. I would say that is fairly putting it, yes.

Mr. Koen: Thank you. That is all.

The Court: You see, I have allowed those questions of Mr. Maguire's, not to show what the conditions were, but as the basis upon which he can argue to the jury, as a basis upon which you will receive a charge from me when I give you the proper legal boundary lines upon which to predicate a judgment, but to show that they were contentions; and that, of course, that's for the purpose—and he said it was—of arguing to the jury on the issue as to whether or not admissions were made. That's a fair statement, isn't it, Mr. Maguire? I wanted you to get the line of cleavage between them. The other is the contention of the Government they were admissions and they are [848] going to argue the other way.

Recross Examination by Mr. Maguire.

X-Q. When you dictated that memorandum, I take it you followed your jottings or notes as you took these things down going from one subject to another?

Mr. Koen: My objection, may it please your Honor. This is re-recross, and it is going into something that has not been covered since the direct.

The Court: Well, I am going to extend a wide latitude

to both, in the effort to help the jury. I will allow that question.

X-Q. I'm going to ask you to answer that question. A. So I can be very responsive, will you please repeat the question?

Mr. Maguire: Would you read it, Mr. Martin?

[Last question read.]

A. I suppose so.

X-Q. So that—

Mr. Koen: Wait a minute. Do you know?

X-Q. Well, will you look at that memorandum, Mr. Isber. A. Both my jottings is a rather vague thing, but I took down those notes and considered my notes in making this memorandum.

X-Q. And you set the things down, the subjects down in the chronological order that is there?

The Court: If you can remember.

[849] A. Of my own knowledge or otherwise, that I couldn't remember, but I set down in substance what transpired.

X-Q. In the order in which you took the notes? A. Yes.

The Court: He said he couldn't remember.

Mr. Maguire: If your Honor please,—

The Court: No, but he said he couldn't remember.

The Witness: I have no recollection. I will have to make an assumption.

X-Q. Certainly, as you went from subject to subject,—let's take any given subject on which there was discussion,—there would be some discussion about the subject dealing with facts, and then there would be these arguments following from those facts, isn't that correct? A. Could be.

Mr. Maguire: That is all.

Mr. Koen: That is all.

The Court: May I see that statement, please? Will you come up, counsel?

[850] [Conference at the bench:

The Court: Am I correct, gentlemen, in assuming these have been marked for identification?

Mr. Maguire: No, I was just going to suggest that be done now.

The Court: There is a mark up here.

Mr. Koen: That was during the voir dire, sir.

The Court: They were marked for identification. [Examining.] I don't see any part in this about the raid in 1943.

Mr. Koen: Yes. I think it is at the bottom of the first page, your Honor. My memory is right about where your fingers are. Am I right?

The Court: That's right. I would like to have it incorporated in this record, these will be marked for identification, but so there will be no misunderstanding—

Mr. Koen: Not to go to the jury?

The Court: No. So they will be available in case you need them.

Mr. Maguire: That's right.

The Court: But I have particular reference to the following:

"Mr. Garrity emphasized that the Attorney General of Massachusetts, Mr. Bushnell, prosecuted gamblers in Worcester in 1943 and from that time on [851] the taxpayer had no opportunity to earn or accumulate so-called gifts or graft while off the vice squad, which squad had the duty of policing the gambling activities and which could be a substantial source of graft."

Now, I have excluded that, Mr. Maguire, for the specific purpose of—I felt it would do your client irreparable damage.

Mr. Maguire: On that, your Honor, I agree.

The Court: And the United States Attorney does not press the admission of that?

Mr. Koen: Oh, I took your Honor's ruling on that without any quarrel.

The Court: That's right. I wanted it in.

Mr. Koen: I don't know what the purpose of that last remark of your Honor's was but I am sure that all during this case I have not tried to show anything which might be considered harmful—

The Court: I wanted to put that in. They have been asking questions about this remark and I wanted to get it in so that they will know.]

The Court: I understand the instruments marked at the voir dire are to be marked for identification, and I do that so that they will be available at any time in any hearing in this court or any place else in connection with any ruling I have made.[852] I should say any proceeding that follows the trial of this case.

Mr. Di Mento: Mr. Calatrello.

LOUIS J. CALATRELLO, Sworn.

Direct Examination by Mr. Di Mento.

Q. What is your name and address, please?

The Court: We can put that blackboard over nearer you, if you want to.

[The jury indicates satisfaction with the present location.]

[The blackboard is moved.]

Mr. Maguire: Does your Honor have any suggestion as to where I might sit?

The Court: You and Mr. Garrity can come over here.

Q. What is your name and address? A. Louis J. Calatrello, 14 Veterans of Foreign Wars Parkway, West Roxbury.

Q. And your occupation, please? A. Internal Revenue Agent.

Q. How long have you been a Revenue Agent? A. 13 years.

Q. Since 1943? A. Yes, sir.

Q. And have you had some accounting education? A. Yes, sir.

Q. And you are a graduate of some school? [853] A. Bentley School of Accounting.

Q. Since 1943 what have been your duties as a Revenue Agent? A. To audit the books and records of various taxpayers for the purpose of ascertaining the accuracy of the returns filed.

Q. Now, you are the Mr. Calatrello who authored the so-called Calatrello memo? A. That is right, sir.

Q. And were you with Mr. Garrity and Mr. Massei and Mr. Hurst at the opening of the safe deposit box at the bank in Westerly, Rhode Island? A. I was.

Q. And do you have—

Mr. Maguire: Mr. Di Mento, excuse me. If you are going into that I would like to get back to where I can look at the w tness.

Mr. Di Mento: Go ahead.

Mr. Maguire: May I suggest you do this end of it first?

Mr. Di Mento: All right.

Q. You have sat here all during the trial, haven't you? A. Yes, sir.

Q. And you have heard the evidence. Now, assume for the purposes of my following questions that the defendant, during the calendar years 1946 through 1950 inclusive, was married and had two exemptions, himself and his wife, and assume that in each of [854] the five years he filed a joint income tax return and now assume that in 1946 his adjusted gross income, his true adjusted gross income,

was $29,658.73, what would be his tax liability? A. His tax liability would be $11,474.49.

Q. The tax reported from the tax returns was $361; is that correct? A. That's correct.

Q. Does that leave a deficiency in tax? A. Pardon?

Q. Is there a deficiency in tax? A. There is a deficiency in tax of $11,113.49.

Q. Assume that in 1947 the correct adjusted gross income of the defendant was $11,583.74, what would be the correct tax liability of the defendant for that year? A. Correct tax liability would be $2,538.23.

Q. The tax return reports a tax liability of $416. Is there a tax deficiency resulting? A. The tax deficiency resulting would be $2,122.23.

Q. Making the same assumptions for the year 1948 and assuming that the adjusted gross income corrected was $7,907.24, what would be the correct tax liability? A. The correct tax liability for the year 1948 would be $1,033.04.

Q. The tax returns reported tax liability of $477. Is there a deficiency? [855] A. There is a deficiency of $558.04.

Q. Making the same assumptions for the calendar year 1949, and assuming that the corrected net income of the defendant for that year was $11,127.76, what would be the correct tax liability for that year? A. The correct tax liability for that year would be $1,879.48.

Q. And the tax return reported $549.02. Is there a deficiency? A. The deficiency for 1949 would be $1,330.46.

Q. Making the same assumptions for the year 1950 but assuming the corrected net income was $37,199.39, what would be the amount of tax owing thereon? A. The income tax liability for 1950 would be $11,251.72.

Q. The tax return reported a tax liability of $862.48. Is there a deficiency? A. The deficiency for the year 1950 would be $10,389.24.

Q. What is the total five-year deficiency in tax? A. The total deficiency for the years 1946 through 1950 is $25,513.46.

The Court: Now where would you like to sit?

Mr. Maguire: Can they wheel the board back?

[The blackboard is moved aside.]

Q. I began asking you whether you recalled being with Mr. Hurst, Mr. Massei and Mr. Garrity at the opening of the safe deposit box at the bank in Westerly, Rhode Island on November 27, 1951. A. Yes, sir, I was.

[856] Q. I am going to hand you now the Calatrello memo. Would you please tell us, and you may refer to those notes to refresh your recollection, if necessary, what was said during the opening of the box in the presence of the defendant, stating who said it. A. Mr. Hurst asked Mr. Massei the source of the funds that were used to acquire the various assets. Mr. Massei answered him stating that the funds came from many different people. At that point —do you want me to continue?

Q. Yes, please. A. At that point Mr. Garrity interrupted the conversation and Mr. Garrity stated that Mr. Massei got these funds during prohibition days when he let the trucks roll through Worcester and Mr. Massei then picked up the conversation again and said he got the funds in the nature of a gift and therefore he didn't report it or he didn't think it was taxable, or something to that effect.

Mr. Di Mento: Your witness.

Cross-examination by Mr. Maguire.

X-Q. Mr. Calatrello, what did you use to refresh your memory here today? A. Well, I used this memo here.

X-Q. The so-called Calatrello memo with the summary sheet? A. That is correct.

X-Q. When did you prepare that? A. I prepared that inventory of the contents of the box right in the small room at the bank.

[857] X-Q. Now, the summary, when did you prepare that? A. That was prepared probably two or three days later. It might have been the next day, and might have been two days; it might have been three days.

X-Q. In due course the investigation in this case was completed and the file was forwarded, as I understand it, to Mr. Isber's office? A. Yes.

X-Q. And I assume, am I correct, that this summary accompanied that file? A. Yes, I believe so.

X-Q. When was the next time you saw this summary? A. This summary here?

X-Q. Having particular reference to your notation as to what Mr. Massei said down there at the box. A. Well, I was called over to the United States Attorney's office probably a month or two months ago and told that they were getting the case ready for prosecution and I believe at that time I looked it over.

X-Q. That's the first time that you saw it since the time the file, in effect, as far as your office was concerned, was closed over four years ago? A. No, I will take that back. This memorandum here I have had in my possession for the last—this did not go in with the original report. This was one of my working papers—

[858] X-Q. When was the last time—

Mr. Koen: What was the answer?

The Witness: This was one of my working papers and I had it in my file.

X-Q. When was the last time after the file in this case, the investigation was completed, when was the next time that you saw this memo? A. Well, as I said, I had it in my possession all the time. The next time I looked at it was when I was called over to the United States Attorney's office, and at that time I looked it over.

X-Q. That was about a month ago? A. Probably a month ago, probably two months ago.

X-Q. So that there was a four-year gap between the time you last saw it and up to seeing it about a month ago? A. That's right.

X-Q. Did you have any other notes which you used to refresh your recollection of testimony as to what transpired down in Westerly, Mr. Calatrello? A. I have a memorandum on 11-27-51 in my diary in which I just state that—

X-Q. Will you get your diary, please? Is it in the court room? A. Yes, sir, it is in the court room.

[Mr. Koen hands the witness a book.]

X-Q. Is there anything else you used to refresh your recollection [859] about this Westerly safe deposit visit? A. No, except this notation that I went to Westerly that day.

X-Q. In other words the two documents before you, one is your diary entry and the other is the memorandum which you prepared within a day or two? A. That is correct.

X-Q. Now, Mr. Calatrello, I assume you talked with Mr. Hurst about this? A. Well, during the course of getting prepared here I discussed it with him, yes.

X-Q. Well, there is no doubt about that, is there? A. No.

X-Q. And you discussed with him what he was going to testify to on this subject and what you were going to testify to; is that correct? A. Yes.

X-Q. And you showed him your Calatrello memo which you state that, in answer t Harold's question as to source, he stated he got it from—what did you say, many different people? A. It came from a number of different people.

X-Q. Now, Mr. Calatrello, first let me ask you what is there in your diary entry of that day that pertains to this statement by the defendant and by Mr. Garrity? A. There is nothing in there pertaining to that statement.

X-Q. Will you read into the record, please, what your diary entry [860] does state? A. My diary entry just

states to Westerly, Rhode Island and Worcester, Massachusetts with Harold Hurst who examined contents of safe deposit box re Massei.

X-Q. At the time you made up this summary I assume you regarded this item as of enough interest or significance to put down in the memorandum; is that correct?

Mr. Di Mento: I object, your Honor.

The Witness: Will you repeat the question?

Mr. Di Mento: May we have a ruling first, please?

The Court: Well, it is cross-examination. I will allow it.

Mr. Maguire: Will you read the question, Mr. Penney?

[The question is read.]

A. Yes, sir.

X-Q. As a matter of fact it was a matter of great importance, wasn't it? A. Yes, sir.

X-Q. Mr. Calatrello, why didn't you put down the rest of it? A. Well, I didn't put down the rest of it because—may I explain how it happened?

The Court: Go ahead.

Mr. Maguire: I wonder— Answer my question and then—

The Court: He is going to give you the answer. Go ahead.

A. [Continued] You see, I was completing the inventory here and [861] I had completed it when Mr. Hurst spoke to Mr. Massei about, oh, a fur coat and some jewelry and also about an icebox and a stove and a kitchen set bought in Westerly for the new house and I wanted to get that down so I completed my inventory, and I took another piece of paper and I wrote that in because Mr. Massei, I believe, stated at that time that he set a value of $800 on it. I was interested in that value for the purposes of the net worth statement and that is when Mr. Hurst asked Mr. Massei the source of the funds and

when Mr. Hurst asked him the question, I wrote down the answer and I wrote it down fast because I abbreviated it and after—I scribbled it out and I didn't get it all down because, well, we probably got up to go then and I just got that much of it down there.

[862] X-Q. Well, now, let me understand you, Mr. Calatrello. This conversation which you related, both as to the defendant and Mr. Garrity, took place as the conference was breaking up? A. Right at the end of the conference, yes.

X-Q. And do I understand you remained seated scribbling, as you put it, while they started to leave the room? A. No, I wouldn't say that, but we were all seated.

X-Q. Well, was there any— A. I wrote this down fast because they were probably getting up, and I just scribbled it out there and got up with them.

X-Q. Was there such great urgency, Mr. Calatrello, that you felt you couldn't sit there and take another minute or two to finish what Mr. Garrity had said?

The Court: Don't you think that is argumentative, Mr. Maguire?

Mr. Maguire: If your Honor please, this witness has just made a statement, and I would certainly like to find out what he meant by it.

The Court: I'll let him answer.

A. Well, I had completed the inventory and there was nothing else to discuss. Mr. Hurst was doing the questioning and he had finished, and we all stood up and walked out.

X-Q. So then you stood up and as far as you were concerned, you added nothing further to that memorandum? A. Nothing. Absolutely nothing.

[863] X-Q. And now, four years later, when you have your conference here with the United States Attorney, you recall these additional items of conversation?

Mr. DiMento: I object.

X-Q. Is that correct? A. Mr. Maguire—

X-Q. No, please! Answer the question.

Mr. Koen: No, there's an objection.

The Court: I'll permit it.

Mr. Maguire: Wait just a minute. Please!

The Court: I think the witness can defend himself if he's allowed to answer.

X-Q. Will you answer it?

Mr. Koen: Will your Honor have the question read back so you can get the full effect of it?

The Court: Yes, I will. Let me have the question. What is it?

[The reporter reads the following question:

"And now, four years later, when you have your conference here with the United States Attorney, you recall these additional items of conversation?"]

A. This memorandum—

Mr. Koen: Wait a minute, please. I think the question carries certain indications that are not merited or warranted here.

[864] The Court: I think the witness should be allowed to answer the question.

Mr. Maguire: I will be glad to have him do it in his own way, your Honor.

The Court: That's right.

X-Q. Please go ahead, Mr. Calatrello. A. This memorandum that I had on the end of the statement of the contents of the safe deposit box, as I say, I made down at the vault there, down at the bank, and when I read it and thought it over it brought back the conversation that took place there. No one gave me the idea. I distinctly remembered it.

The Court: Distinctly remembered what?

The Witness: The conversation that took place down there.

The Court: You distinctly remember it.

The Witness: Yes, sir.

The Court: Did you have it in mind, did you remember it before you went in to the United States Attorney's office to talk with anybody? Did you?

The Witness: I had an idea of it, yes, what took place down there. When I read this and thought the thing out, I knew just exactly what was said there. That's why I didn't add anything on here.

X-Q. At the conference with the United States Attorney a month ago when they called you in, did they show you the Isber memorandum? [865] A. No, sir.

X-Q. Have you ever seen it? A. I don't believe so.

X-Q. Other than the testimony you referred here in court about it, that's all you know about it? A. That's correct.

The Court: You were not present in Mr. Isber's office at the time the conference was had?

The Witness: No, sir.

X-Q. Am I clear, Mr. Calatrello, from your testimony, as I understood it, that you prepared the inventory and Mr. Hurst recited the contents of the box to you? A. That is correct.

X-Q. Now did you prepare the summary a day or two later? A. The summary I made out. This last sheet here isn't a part of the summary. That is a continuation of the contents of the safe deposit box. These papers were just taken and punched together. That happened to be the last sheet. That summary was probably made up the following day or two days later.

X-Q. But the thing we are interested in was definitely made up at the tail end of the conference? A. That is correct.

Mr. Maguire: Could I have a minute, if your Honor please?

The Court: Oh, certainly.

[866] [A pause.]

Mr. Maguire: No questions.

Mr. DiMento: You are excused, Mr. Calatrello.

Mr. Koen: The Government rests.

The Court: The Government rests, Mr. Maguire.

Mr. Maguire: I have some motions, if your Honor please.

The Court: Come up.

[Conference at the bench, during which the following is recorded:—

The Court: Are you resting?

Mr. Maguire: No.

The Court: I am not passing on the motions now.

Mr. Maguire: You are not?

The Court: No. If you rest on it, I'll pass on it. If you are not resting, I'll pass on it when the evidence is in.

Mr. Maguire: May my rights be saved?

The Court: Oh, surely.

I think the hour is late and perhaps we should adjourn.]

The Court: Let me give you this admonition now. Weekends—well, they're times of joy and they're times of sadness. They are whatever the good Lord wants them to be, and [867] we have to take them in stride. And I suggest that you try to remember all the details of the case but certainly refrain from discussing it with anybody. Form no conclusions, because I have carefully refrained from, except in one instance, probably one or two instances, indicating to you what the law is, and I haven't scratched the surface of it. It would be most unfair to this defendant were you to do it, and it would be most unfair to the sovereignty of the United States. The right to a trial by jury is a very, very precious right. It is a right that we have to safeguard. It's a right which I have tried to safeguard here. I think all you lovely ladies and gentlemen

will agree that I haven't indicated a thought on my part on that. I have not. Obviously, as I said when I spoke to you in the first place, a person cannot live in a vacuum, so to speak. He has to live in a philosophy where he thinks. If he couldn't think, why, he would be either mentally unsound or like a dumb animal. Dumb animals have senses. We have intellects. We talk a common language. We have faculties of the mind by which we are able to think, and obviously everyone thinks. Sometimes they don't think enough. But for the purpose of this case you should be very, very careful not to form any conclusions. And I speak of this only because I would be thoroughly insincere if I were to say to you that I don't get mental reactions the same as you do. Of course I do. I have to strip myself of every bit of prejudice, every bit of feeling that I have, because if I didn't do [868] that, I would be the thirteenth person in the jury room, and our Founding Fathers never intended there should be more than twelve.

The last person that knew more than twelve men was the Son of God. The last person before the Son of God was his Father who functioned in the days of the philosophy of the oldest religion of all, the religion of Judaism, with its great saints, and with its great philosophers, and with its great culture and with its great heritage, the philosophy of the Ten Commandments that were given by that First Person to Moses, with the philosophy of Abraham and the Prophets. They represent the cornerstones of a worthwhile, Godlike civilization.

Therefore, we have to think in terms of what these precious rights mean. But I speak of it only because I want you to be sure to keep your minds wide open, in the first place, upon the assumption that you are going to pass upon the issues in this case. You are entitled to receive the argument of Mr. Maguire. Mr. Koen has the same right to expect that same consideration of you, and I know

you will give it. All those things point to one thing, that is, just go home and have a nice relaxation, have good health. Let's hope we'll have warmer weather. Enjoy yourself and, God willing, I'll see you here Monday morning at 11 o'clock.

[Adjourned to 11:00 a.m., Monday, April 16, 1956.]

[869] TENTH DAY

Court Room No. 5
Federal Building, Boston
Monday, April 16, 1955 [sic]

[The jury entered the court room at 12:25 p.m.]

The Court: I understand the Government has rested, and you may proceed, Mr. Maguire.

Mr. Maguire: Mr. Walsh, would you dig out the bill of particulars, please.

Opening Statement to the Jury by Richard Maguire, Esq.

If you Honor please, Mr. Foreman and ladies and gentlemen of the jury, in making my opening to you this morning, I want to talk to you, first, a little about this crime of the statute under which the defendant is charged. Now please bear in mind that whatever I might say on that I trust I am correct, but whatever I might say on that, you take the law from his Honor, and whatever I might say if his Honor in effect disagrees, as far as the law is concerned, he is the boss, as he is in many other things.

The Court: That's subject to what they call in philosophy, as they say, cumdum quid. There is always someone over me, and that's the way it should be, too.

Mr. Maguire: The statute, Mr. Foreman and ladies and gentlemen, with which we are concerned here, is 26 U. S. Code Section 145(b). There are three elements of the crime under that statute. First, you have to show an attempt to evade; secondly, [870] you have to show that the evasion

was wilful, that the person did it deliberately; and, thirdly, you have to show there is an additional tax owing.

Now, that is the usual tax case, and the Government in its proof in the usual case must come in and show unrecorded sales, or illegal deductions, things such as that.

In this case, as you have heard, the Government is proceeding on the net worth theory, so-called. That, in effect, is, they are going to try to prove their case by circumstantial evidence. So what they do—and it appears on the board—they introduce evidence that the fellow had $100 at the beginning of a particular year, that his assets increased to $150 at the end of the year, and they say that the increase is income.

Now, in terms of that increase, because they prove the case this way, they have two additional elements in addition to the three I have already mentioned, on which they have the burden of proof. The first one is, they have to establish a starting point with reasonable certainty. In other words, they have to satisfy you—and the burden of proof, keep in mind, is always on them beyond a reasonable doubt, which his Honor will tell you about fully later—they have to satisfy you that, as of December 31, 1945, that was all the assets the defendant had—he had nothing else. Obviously, if you folks find that he did have other assets which would account for this increase, that is the end of the case.

[871] Now, a fifth element, and while I don't mean to belittle these other elements I have mentioned, the fifth element is the one upon which your attention will be directed, and that is the element of source. We have this example here which I have talked to you about where we show $100 and an increase to $150. The Government has to establish for you, ladies and gentlemen, where that money came from.

Under the cases, the Government does this in two ways. First, they show that the defendant is in an income-

producing business. One good illustration of that is an an actual case where the defendant owned a string of gambling houses. Now in this particular case I don't think we are concerned with this because the defendant was a salaried man, so therefore there was a definite ceiling on what he earned each year from the City of Worcester.

The second way in which the Government establishes source is by specific items of unrecorded income; and by that—and I think the best way to tell you what it means is to give you a couple of illustrations. This is, again, a case where there were seven meat peddlers brought in who testified to making over the ceiling payments to the defendant during the years under the indictment. Bear that in mind, during the years under indictment. They testified what they paid for meat, and then they paid some cash over that.

Another case is where a fellow brought in several witnesses, testifying they were bookmakers and that they actually [872] made payments during the years in question to the defendant in that case for protection.

May I have my motion for a bill of particulars, if you please? [Handed.]

Now in this case, after the arraignment,—

The Court: Now will counsel come up, please?

[Conference at the bench, during which the following is recorded:

The Court: I don't think the pleadings are evidence except in so far as they as a matter of law show certain items on the highway the Government has to travel over, and I think it is highly dangerous to read a motion for a bill of particulars and the answer.

Mr. Maguire: If your Honor please, I beg to differ with you. I think it's most important to do so.

The Court: Well, I don't think so. What are you going to read?

Mr. Maguire: What I intend to read is this [handing document to Court].

The Court: You can generalize. I don't like to have you read it all.

Mr. Maguire: As a matter of fact, I intend to—

[873] The Court: It's a piece of evidence—I don't deny that.

Mr. Maguire: Well, why am I not to read it?

The Court: What?

Mr. Maguire: Why should I not be allowed to read it?

The Court: Because pleadings are not to be used. The only pleading of importance that is admissible in the trial of a criminal case is the indictment, and I am going to tell the jury very strongly what that means in my charge.

Mr. Koen: Particularly as they are designed primarily to give information to the defendant of the claim or the actual matters upon which the Government intends to proceed to offer evidence, and within the boundary set by that then the Government is limited to this evidence.

The Court: That's right.

Mr. Koen: I don't see any other purpose.

The Court: That is, the course is charted and if it doesn't correspond you have a right to argument. But it isn't for the jury to say: it's for the Court.

Mr. Maguire: I would like to call it to the jury's attention so that in assessing and weighing [874] the evidence already in the case which the Government alleges bears on source, they will have in mind what Government stated originally as what they intended to prove.

The Court: There is no one who can speak for the Government except those witnesses who do it under oath.

Mr. Maguire: I think when they file a formal pleading, your Honor, they are bound by what it says.

Mr. Koen: I don't think a bill of particulars in and of itself is evidence. I think it is a limitation upon evidence of the Government.

The Court: The trouble is with the bill of particulars. Another thing, is your example, Mr. Maguire, you are giving them the direct method. The witnesses testified. It wasn't the indirect method which we have here.

Mr. Maguire: If your Honor please, this is where we are going to part company. Mr. DiMento apparently takes the position all the Government has to do is to prove the source.

The Court: Likely source, that's right.

Mr. Maguire: This is different.

The Court: That's the way I am going to [875] charge this jury now, see, and you better get ready.

Mr. Maguire: I'm getting ready. I have a motion for acquittal.

The Court: I'm going to reserve it. But when you speak of the pleadings—

Mr. Maguire: All I'm going to do, if your Honor please,—

The Court: Let me look at them.

Mr. Maguire: Here is paragraph 1 there, and here is the next paragraph.

[876] The Court: A jury doesn't know what a motion for a bill of particulars is.

Mr. Koen: Am I wrong, and if I am not wrong, then isn't this the short answer? Doesn't the motion for the bill of particulars and the particulars go into

the jury room for their consideration? If the answer is they don't—

The Court: No, they don't go into the jury room.

Mr. Koen: That is the way I—

The Court: What do you think about it? Don't they become evidence? Aren't they motions for a bill of particulars?

Mr. Maguire: They aren't, but they are going to be.

Mr. Koen: Are they evidence or is there a limitation—

The Court: This is a two edged sword. Is this the same as the computation on the board?

Mr. Koen: Approximately. There may be some variances. There were a couple of things in evidence that developed during the evidence, some liabilities, particularly the passbook loan. May I say there certainly is no objection so far as the tabulation of net worth is concerned?

The Court: You don't object to these, do you? [877] Mr. Koen: I can't see the purpose.

The Court: Except that if you file a motion for a bill of particulars and there is an answer, it doesn't in any way change the charge that I am going to give. Well, go ahead.]

The Court: Let me say this to you, Mr. Foreman and Ladies and Gentlemen of the jury. As Mr. Maguire has well said, and Mr. Koen, you take the law from me. I will tell you what the law is in connection with the yardstick by which you are going to make a determination, and that determination will be made by a yardstick that I will make clear to you. I will try to put it in very simple language so that you will understand it. If at any time you don't, when you are out deliberating, assuming that this case goes to you for consideration, you have a right to call me and ask me, and I will be available at all times to enlarge

and explain any circumstance or to have any piece of evidence read to you, because it has all been transcribed, and we do not require court reporters here to have it done. I think counsel will agree that that is a fair statement. Is that right, Mr. Maguire?

Mr. Maguire: That is correct.

The Court: You are satisfied?

Mr. Koen: Yes, I am, sir.

The Court: Go ahead, Mr. Maguire.

Mr. Maguire: After an arraignment, a defendant in a [878] criminal case, here and everywhere else, has got a right to file what they call a motion for a bill of particulars. In effect what we are asking the government to do is to state to us, the defendant, what the theory of their case is. In other words, we are entitled to know so that we can get ourselves prepared as to what the government is going to prove. In terms of this, we file a motion and the particular part I want to call to your attention, we moved as follows:

1. The source or sources of the defendant's alleged unreported income for each of the calendar years 1946 through 1950.

In answer to that the government filed its motion and in answer to paragraph 1 they stated: The likely source of unreported income of the defendant is monies received by the defendant as an individual from many persons engaged in various illegal activities for the performance by the defendant of his official duties as a member of the Worcester Police Department, for the nonperformance by the defendant of his official duties as a member of the Worcester Police Department, and for the performance by the defendant as a member of the Worcester Police Department of services rendered to such persons in connection with such illegal activities.

In short, and keep in mind that our motion was directed

to the years 1946 through 1950, the government tells us, in answer to our motion, that they are going to come in with [879] evidence to show us that, in effect, there were payments to the defendant during these years.

The Court: May I say this, Mr. Maguire, so that the jury will understand it. This motion was allowed by me on June 6, 1955 and the motion was allowed only as to the likely and probable source of income. That is the limit of that. There is no doubt about that, is there?

Mr. Maguire: Whatever—that's correct, your Honor.

The Court: Motion allowed only as to likely and probable source of income. That was on June 6, 1955. I know you probably forgot it.

Mr. Maguire: Just to go back very briefly, bear in mind under the cases the government has to show specific items during these years of unreported income. That, in their bill of particulars, is what they stated they were going to prove. You heard the evidence on this particular item of source. You heard the testimony of Mr. Isber, Mr. Calatrello and Mr. Hurst.

The defendant, on his side, is going to introduce, put on the witness stand Mr. Garrity, who represented the defendant back in those days, and he will tell you the nature of his conferences with Mr. Hurst and particularly with Mr. Isber and he in effect is going to tell you that as far as he is concerned he was in there as one lawyer to another, making a legal argument in behalf of his client and that he never, never, at any time had ever discussed with the defendant the activities of the defendant [880] when he was on the liquor squad or during prohibition days, when he was in the Worcester Police Department; that he had never, never discussed with the defendant his activities as far as his activities on the vice squad were concerned and the reason for it is because it had nothing to do with the years in question. The years we are con-

cerned with are 1946 through 1950 and, as far as he was concerned, it was a question of making an argument, and he will so testify, as far as he was concerned it was simply a question of, supposing the government file does have evidence that such things took place back in prohibition days what of it? That has nothing to do with what you are concerned with. For the government to prove its case, they have to come up with evidence that this fellow actually got money during the years which are under the indictment.

The Court: Now will counsel come up a minute? Have you finished, Mr. Maguire?

Mr. Maguire: Yes, your Honor.

[Conference at the bench:

The Court: It is your position that the government is obliged to show specific—

Mr. Maguire: Items.

The Court: How could you ever convict anyone under a net worth theory?

Mr. Maguire: Look at the Chapman case, your Honor. I will tell you exactly what I think that means, the [881] likely source. In the Chapman case—

The Court: Take the Holland case, for example, or the Adonis case.

Mr. Maguire: All right. Incidentally, your Honor please, we are very flat that the Adonis case has no bearing on the facts in this case, but leaving that out for the minute—

The Court: It has negatively. They showed the mother was destitute and they showed the mother's mode of living. The government has offered evidence to show this man's mode of living, at the time he was a police officer; isn't that right?

Mr. Maguire: Your Honor please, here is what "likely source" means. In the Holland case, as you know, they showed evidence that this fellow's pro-

cessor was a hotel man. They showed that the receipts of the hotel fell off 70 or 80 per cent in the next three years, which were the years under indictment. They showed actually the number of guests at the hotel went up during that period. It is likely source in that they were never able to trace the receipts from the hotel going into his bank account but they did establish that this was an income-producing business that was available to the defendant. It was a likely source. That is what that has meant, your Honor. In the Chapman [882] case, where we have specific items of unreported income, you have the seven meat peddlers coming in—

The Court: That is a direct way of proving it.

Mr. Maguire: No it isn't, your Honor.

The Court: I don't agree with you on the law on that.]

The Court: Mr. Foreman and Ladies and Gentlemen, I want you to please have in mind this has reference to what the United States Attorney said in his opening and what Mr. Maguire has said in his opening. You are to take the law from me. I will tell you what the law is. "Motion allowed as to likely and probably source of income", and I will explain what that means later on. Any statement made by the defendant's counsel or by the prosecutor are statements that are made in good faith, made upon a factual statement or made upon what their conception of the law is. As Mr. Maguire has well said, you take the law from me. I will give it to you at the appropriate time.

[Conference at the bench:

Mr. Maguire: May we come back at two o'clock rather than 2:15?

The Court: You mean let them get away now?

Mr. Koen: I have no objection. Whatever your Honor says is all right with me.]

The Court: How would you feel about going along now and getting back at two o'clock? Otherwise we would go along [883] with a witness and then we would have to break up the continuity of it, so we will now have a recess until two o'clock.

[Luncheon recess.]

[884] AFTERNOON SESSION

[The jury entered the court room at 2:05 p.m.]

The Court: Will counsel come up a minute.

[Conference at the bench, during which the following is recorded—

The Court: This is a motion for a bill of particulars which Mr. Maguire spoke of and read only one part of it and he left out the other two. If one part of it is going to be read the other two ought to be read. You did it on the theory it is a document, didn't you?

Mr. Maguire: As a matter of fact, I haven't done it yet.

The Court: Well, you read it, and the other two were not read.

Mr. Maguire: If your Honor please, in the course of my argument I was discussing source and I read in Paragraph 1.

The Court: Yes, that's right.

Mr. Maguire: Which is the only paragraph in the bill of particulars relating to the source. The rest of it is in the record one way or another as the Government's evidence, I believe. The figures may not be exact, but they are approximate. Every one of those items, if your Honor please, [885] as set forth in

Paragraphs 2 and 3 of the bill of particulars is already in the record in evidence which the Government has introduced.

Mr. Koen: May I see the motion, sir?

The Court: Certainly [handing]. I wanted to keep it all out, that's what I wanted to do. I think a bill of particulars, you know, is binding. It is an important matter for this court, and it is an important matter for the court of review, the whole thing.

Mr. Maguire: That's right.

Mr. Koen: May I have the other one?

The Court: Oh, surely [handing]. Don't misunderstand me. I simply wanted to help you.

[Mr. Koen and Mr. DiMento confer.]

Mr. Koen: I think it should all go in if any goes in.

The Court: Well, all right. As a matter of fact, I will leave it to the Government to offer it. It isn't for me.

Mr. Maguire: If your Honor please, the part I read in my opening I assume is not yet in evidence. I intend, however, to offer Paragraph 1, both the motion and the answer.

The Court: I think that is perfectly proper.

[886] Mr. Koen: In its entirety?

Mr. Maguire: No. If you want to put in the rest, Mr. Koen, why—

Mr. DiMento: You mean offer it in evidence?

Mr. Maguire: I am going to read it in.

Mr. Koen: You have read Paragraph 1 in already, haven't you?

The Court: As part of the opening.

Mr. Koen: Oh, I see. May I say this. When Mr. Maguire formally presents it for the record, I should like the opportunity of reading in 2 and the response thereto, and 3 and the response thereto.

The Court: I will pass on it when you get to it. I'll pass on yours when you get to it, because the opening of counsel, I have made it clear, isn't evidence.

Mr. Maguire: Yes.]

[887] The Court: You may proceed, Mr. Maguire.

W. Arthur Garrity, Sworn

Direct Examination by Mr. Maguire

Q. State your full name, please. A. W. Arthur Garrity, Jr.

Q. And your address? A. 40 Radcliffe Road, Wellesley.

Q. And your business? A. Attorney at law.

Q. Offices are where? A. 31 Milk Street.

Q. Would you care to give the name of the firm? A. Presently, Maguire and Roche.

Q. A very fine firm, I am sure, Mr. Garrity. [Laughter.]

The Court: I didn't get that.

Mr. Maguire: I think you probably deliberately didn't hear that.

The Court: No. I wanted to get some record for one of the distinguished lady representatives of the United States Attorney's office. Read it.

[The questions and answer read.]

The Witness: I mean to say yes.

Q. Mr. Garrity, will you tell us your educational background and legal experience, please? A. I attended the public schools of Worcester until going back to [888] Holy Cross College, graduated from Holy Cross College in 1941, started Harvard Law School, interrupted for a couple of years, returned to Harvard Law School—

Q. What was the interruption? A. Service in the Army Signal Corps. Graduated Harvard Law School, 1946. I was admitted to the bar of Massachusetts in that year. My

first employment was as a law clerk for one of the Judges of the United States District Court for this District. Thereafter I was employed for a period of approximately two years as an Assistant United States Attorney, prosecuting criminal as well as civil cases on behalf of the Federal Government, including the prosecution of several tax fraud cases.

Following my service as Assistant United States Attorney I entered private practice and for the past four or five years have been a partner of Mr. Maguire's.

Q. Have you ever done any teaching, Mr. Garrity? A. Yes, sir, I have given courses in federal jurisdiction and procedure at Boston College Law School.

Q. Now, Mr. Garrity, during the course of the investigation—first of all, you did represent the defendant, Mr. Massei? A. Yes, sir, I was retained by Mr. Massei toward the beginning of November, 1951.

Q. And during the course of the investigation the man in the government that you dealt with primarily was Mr. Hurst, who testified here? [889] A. Yes. I met Mr. Hurst soon after having been retained by Mr. Massei and I conferred with him—

Mr. Koen: Wait a minute, please. The question has been answered.

The Witness: Excuse me.

Q. During the course of the investigation, Mr. Hurst has testified you turned over to him what he described as documentary evidence, bankbooks, checks and so forth. A. Those are records—

Mr. Koen: Is that a question?

A. [Continued] Yes, I did.

Q. And also Mr. Hurst has testified during the investigation he asked you for certain information. Will you please tell the Court and jury how you furnished that information to him? A. I first met with Mr. Hurst and

he asked that I obtain for him documentary evidence concerning the assets of Mr. Massei and concerning the expenditures made by him during the six-year period from 1945 to 1950. I conferred with Mr. and Mrs. Massei regarding the ownership of assets by them during that period from 1945 through 1950 and set forth the facts as I received them from Mr. and Mrs. Massei in a series of letters addressed to Mr. Hurst, which letters have been marked in evidence in this case.

Q. There is no doubt, Mr. Garrity, that you intended that that should be—

[890] Mr. Koen: No.

The Court: No. No characterization.

Q. Now, Mr. Garrity, let me direct your attention to the conference with Mr. Isber. Will you please tell the Court and jury when it took place, who was there and, without getting into the conversation, yet what was pertinent to the conference. It was held in the Federal Building, I believe? A. Yes, it was held in this building, one floor below where we are here in the court room. The date was May 20, 1952. The agent's investigation had been completed approximately two months before. I requested the conference either from Mr. Isber or from his associate district counsel, Mr. Altkrug.

The conference, as I say, was held in Mr. Isber's office. Three of us were present. I recall Mr. Isber seated across his desk. I was seated in front of it and Special Agent Hurst, who also attended, was not at the desk but rather was seated perhaps five or six feet away from the desk. There was no stenographer present.

There was no special procedure followed. I spoke extemporaneously. I had nothing with me in the form of a brief or in the form of papers or other documentary evidence. I took no notes. Mr. Hurst also took no notes. Mr. Isber did have in front of him a pad of scratch paper

and occasionally, during the course of the conference, which lasted approximately an hour, Mr. Isber made penciled notes. I can not recall whether he ever [891] turned the page on the block of paper in front of him but I am certain that he didn't write as I spoke, but did on occasion jot down what I presume to be some of my remarks. I did not request a copy of any memorandum nor was there any statement to me that any memorandum was to be prepared as a result of the conference.

Q. Now, Mr. Garrity, during the course—did you say this conference lasted about an hour? A. To the best of my memory, yes.

Q. Will you please tell the Court and jury what the conversation was that took place in that room that day? A. I shall try to tell you to the best of my recollection what I told to Mr. Isber. "I appreciate the opportunity of—"

Mr. Koen: No; I pray your Honor's judgment.

A. [Continued] "—of conferring with you with reference to the—"

Mr. Koen: Is this the conversation?

The Witness: This is the conversation.

Mr. Koen: Thank you.

A. [Continued] "—with reference to the affairs of this taxpayer whom I have represented since November of last year. The subjects which I wish principally to discuss with you this morning are a legal subject, namely the applicability of the reasonable hypothesis rule of law in tax fraud cases in the First Circuit, and I shall further wish to take that rule, the reasonable hypothesis rule, and apply it to various hypotheses, [892] factual hypotheses existent in this tax fraud case.

"I am unaware of the exact nature and contents of the government file and I shall discuss various factual circum-

stances in the alternative, as I proceed with my statement to you.

"You have here a taxpayer who has had an honorable record as a member of the Worcester Police Department. He went on to that police force about 1923, rose through the ranks. His duties at first were those of a motorcycle policeman for the most part. He was in an accident with an automobile some time in the early '30s and he sustained a physical injury which has lingered with him to this day. It was the basis for his retirement from the police force at the beginning of this year.

"Officer Massei rose in the ranks of the Worcester Police Department, becoming a sergeant, in which capacity he was the head of the vice squad for a period of years ending in 1943. Subsequently he was elevated to the position of lieutenant and I have received from the Chief of Police of the Worcester Police Department a statement of his record, which statement includes the fact that he had an excellent record while a member of the Worcester Police Department.

"You live here, also, Mr. Isber, a taxpayer who has cooperated 100 per cent with the Agents of the Revenue Department. At the very outset of the investigation he placed in a suspense account at the office of the Collector sufficient money with which to pay any civil liability that might be [893] assessed against him as a result of the current investigation."

I said also that, "To the best of my knowledge the returns filed by the taxpayers for the years that you, Mr. Isber, must consider, are 100 per cent accurate. The basis for my contention in that regard is that—"

Mr. Koen: May I interrupt here, may it please the Court? I think it is about time the jury were instructed the statements of Mr. Garrity, both at this conference and on the stand are not evidence as to the truth of the facts

or statements he is making. It is for them ultimately to determine.

The Court: Will counsel come up?

[Conference at the bench:

The Court: I have to charge this jury if what took place were contentions rather than admissions, rather than that which could be characterized as admissions binding upon the defendant, that that is a circumstance in favor of the defendant. You will agree with that?

Mr. Koen: Yes.

The Court: You say I should instruct the jury now on what?

Mr. Koen: That these recitations of his are not evidence of the facts that he recites.

The Court: I think that's right.

Mr. Maguire: I am not quite sure what he means by [894] that, your Honor.

Mr. Di Mento: Mr. Garrity stated the defendant has an excellent police record, that he told Isber that the defendant has an excellent police record. That is not evidence that he did have an excellent police record.

Mr. Maguire: On that I go along but if you instruct them on what Mr. Koen has requested, it seems to me they may get the wrong—

The Court: I can take care of it later. He said, "This is a contention."

Mr. Maguire: I think everything he says is a contention, your Honor.

The Court: I disagree with you. I don't think so. That is for the jury to say. It isn't for me to say.

Mr. Koen: That is my point. It is ultimately for the jury.

The Court: Don't misunderstand me, Mr. Maguire.

What I mean is, I disagree. It is for the jury to say. I am expressing no opinion one way or the other.

Mr. Di Mento: Your Honor, as one instance, there is the statement that the taxpayer was cooperative 100 per cent. The jury is apt to think that is the fact, where it is for them to find that.]

[895] The Court: I want to say to you, Mr. Foreman and ladies and gentlemen of the jury, I don't want to have this remark considered as anything which would suggest undermining the testimony of this young man. I don't mean it that way. But it is agreed that any statement that Mr. Garrity made that the defendant had an excellent police record is a matter that is not before you. That is a matter of opinion. And the other statement was—what?

Mr. DiMento: There were various statements of fact which were mentioned at the bench, your Honor. There was the statement about cooperation.

The Court: That's right. The statement that the defendant gave cooperation to the United States Government is a statement which you will consider only as a general statement coming from counsel in good faith, not going to the heart of the issue that is here in this case, which I will charge you on the law later on. And I say this with no desire to inject my personality into this case because I am not going to do it.

Is that statement satisfactory to counsel?

Mr. Maguire: Yes, your Honor.

The Court: Is it satisfactory to you?

Mr. Koen: Yes, your Honor.

The Court: You will have that in mind. Generalizations are a matter of contention, and what it is, later on it will be for you to say what it is under the instructions which I [896] will give you with reference to it.

The Witness: There is a circumstance which I ne-

glected to state in connection with the setting of the conference which I would like now to state if permitted.

Q. Please go ahead, Mr. Garrity. A. Mr. Isbe. was the first attorney representing the Government with whom I had an opportunity to confer with reference to the issues involved in the Massei case.

The Court: Well, isn't that the usual procedure, Mr. Garrity? Let's be frank about it. You go through these investigative agencies, then you reach the law department, the Criminal Division of which Mr. Isber was—that's the first time that situation was presented to you.

The Witness: Yes, sir.

The Court: That's the usual procedure.

Mr. Maguire: That's correct, your Honor.

The Court: That's right. And I think the jury should know it. I say that now, that's the first time, that's the course of procedure the Internal Revenue Department offered taxpayers who were under investigation. They have a right to seek, to sit down with counsel and try to prevail upon counsel not to recommend adversely to their client. And Mr. Garrity was there for a very laudable purpose—no doubt about it. He had a right to be there, because the provisions, the regulations of the Treasury Department gave him the right to be there. This is the [897] first time the regulations provided for a hearing before an officer. You know what I mean by an officer; a member of the bar, legal officer.

Now is that statement a perfectly satisfactory statement? Is it, Mr. Maguire?

Mr. Maguire: Yes, sir.

Mr. Koen: Yes, sir. Yes, your Honor.

Q. Coming back to the conversation, Mr. Garrity, you were testifying about the cooperation of the defendant. Will you please go on. A. I said that the taxpayer here has cooperated at every step. Whatever questions Special

Agent Hurst put to me I answered for him in the form of written communications. I went to Mr. and Mrs. Massei with his questions, I sat down with them and answered them with Mr. and Mrs. Massei; drafted a letter, usually in the presence of the taxpayer and his wife; went right to the office and sent that communication to Special Agent Hurst. I arranged for the inspection and examination of safe deposit boxes of the taxpayer with the Special Agent.

All in all, the taxpayer has cooperated at every stage.

The defense of the taxpayer, I said to Mr. Isber, in this situation is that all of the cash which he expended during the six-year period from 1945 to 1950 was in his possession at the beginning of 1945. That, plus the defense and fact that every item to the penny of his tax returns for the period in [898] question has been corroborated, to the best of my opinion, to the Special Agent. Every penny that this taxpayer received in dividends from a wide variety of securities has been reported accurately on the tax returns. Every cent of interest which the taxpayer and his wife received from the banks in which they have savings accounts has been reported accurately and to the penny.

In view of the defense of the taxpayer, a legal question becomes most important. Does the reasonable hypothesis rule, as exemplified by Seventh Circuit Court decisions, apply in the First Circuit, which embraces Massachusetts as well as other New England States? The reasonable hypothesis rule is exemplified by the cases of Ryan v. United States and United States v. Fenwick. That rule is followed in only some of the Circuits of the Federal Judicial System. The conflicting rule, known as the substantial evidence rule, is followed in other circuits.

There has never been, Mr. Isber, a decision in the Court of Appeals for the First Circuit in a net worth tax fraud case, and it is uncertain whether or not the First Circuit

Court of Appeals would follow the reasonable hypothesis rule or the substantial evidence rule.

However, Mr. Myer Rothwacks, presently the Chief of the Criminal Section of the Tax Division of the Department of Justice, has written a leading Law Review article in the field of net worth tax fraud prosecutions. He has cited the case of Revera against United States as authority for the proposition that [899-900] the First Circuit Court of Appeals would follow the reasonable hypothesis rule, which requires the Government to exclude beyond reasonable doubt every hypothesis inconsistent with the defendant's innocence—excuse me,—inconsistent with the defendant's guilt and consistent with the defendant's innocence. That rule is important in this case because it's upon a crucial consideration, namely,—

Mr. Koen: Is this still the conversation?

The Witness: This is just—I am making a legal argument to Mr. Isber.

Mr. Koen: All right. I'm sorry.

Mr. Garrity: This is what I said to him.

A. [Continued] I said I understand that the Government file in this case may contain evidence to the effect that my client accepted gifts and gratuities back in prohibition days, when and in consideration of his having violated his duty as a law enforcement officer. I don't care if every liquor truck which passed through the streets of Worcester stopped and paid him a gift on the spot. That, Mr. Isber, is no basis for claiming that he evaded his taxes during the years 1945 to 1950. The same situation is true with regard to the period of time that he was on the Vice Squad. Even if his activities as a member of the Vice Squad were far worse than any activity of his back in prohibition days, you should examine his file with reference to the period 1945 to 1950. That's the period you should be concerned with. Whatever happened

before is not a proper basis for proceeding against [901] him for the crime of tax evasion during the period which has been investigated by the Agents. The reasonable hypothesis rule requires that the Government pinpoint the source during the prosecution period from which the Government claims that the defendant derived taxable income. Even if the First Circuit Court of Appeals does not follow the reasonable hypothesis rule, under the so-called substantial evidence rule the Government, while it need not pinpoint the source during the period under investigation, must establish affirmatively that there is such a source and trace the income charge to that source.

In this case, Mr. Isber, there is another rule of law applicable, not only to tax fraud prosecutions, but to all prosecutions for any crime. It is exemplified in the tax fraud field by the case of *Lurding* v. *United States*. The rule is that it is fundamental that a man should be prosecuted only for the crime with which he is being charged. You should not prosecute a man for drunkenness because he fails to support his wife. You shouldn't prosecute a man for one crime because you may think he may have committed another crime or series of crimes. In this case you should recommend prosecution against my client only if in the light of the rules of law which I have stated the facts warrant it; and, in my opinion, the burden upon the Government in this case, in the light of the decisions, cannot successfully be sustained in court, and I respectfully urge you to recommend that prosecution of my client, Mr. Massei, be dropped.

[902] The Court: You will agree with me, Mr. Garrity, in the light of your experience as an Assistant United States Attorney, that when you sat down there with Mr. Isber you were conscious of the fact that he had no authority to prosecute.

Mr. Garrity: He recommended for all cases—

The Court: No, will you answer my question. He had no authority to prosecute, did he?

The Witness: Not in the sense of presenting a case to the Grand Jury.

The Court: That's right. The only one that can present a case to the Grand Jury is a person authorized by statute to do so. Isn't that right?

The Witness: Yes, sir.

The Court: And that is the representative of the Attorney General of the United States?

The Witness: That's right, your Honor.

The Court: Dignified by the presence of a statute which regulates and controls the appointment or the nomination of a United States Attorney, confirmed by the Senate of the United States, and then the arrangement of his staff that serve as prosecutors, and when they reach that point they have all the powers of the Attorney General.

The Witness: Yes, sir.

The Court: You knew that when you talked to him?

The Witness: Very definitely so, your Honor.

[903] The Court: That's right.

Q. Mr. Garrity, did you ever have any conversation with the defendant at any time relative to his activities on the Worcester Police Department during prohibition days? A. Never at any time, either directly or indirectly.

Q. Mr. Garrity, did you ever have any conversation with the defendant relative to his activities when he was on the Worcester Police Department, Vice Squad? A. No, sir. Neither of us even ever alluded to that.

Mr. Koen: No, wait a minute. You have answered it.

A. No.

The Court: Wait, please.

Mr. Koen: I ask that it be stricken.

The Court: It may be stricken.

Q. Mr. Garrity, did you personally, either today or at

any time, have any knowledge of the defendant's activities when he was a policeman during prohibition days?

Mr. Koen: I object.

A. No, sir, I didn't.

Mr. Koen: Wait a minute, please.

Mr. Maguire: I'm asking for his personal knowledge.

The Court: I exclude it.

Mr. Maguire: May I make an offer of proof, your Honor?

The Court: Yes.

[904] [Conference at the bench, during which the following was recorded:—

Mr. Maguire: The answer would be that he has no personal knowledge.

I am going to put another question, if your Honor please, and it has to do with his activities while he was on the Worcester Vice Squad. I will ask Mr. Garrity if he has any personal knowledge of the defendant's activities, and his answer will be "No."

The Court: Let me ask you this: Do I understand that what he says is a categorical denial of a conversation that Mr. Hurst had with him?

Mr. Maguire: No, sir.

The Court: When he said he got his money from grafting?

Mr. Maguire: Let me say this.

The Court: Where did he get that information?

Mr. Maguire: Just a minute, if your Honor please. That Mr. Hurst's statement is Garrity said the defendant—

The Court: He said the defendant spoke first, then he spoke, and then the defendant said [905] nothing.

Mr. Maguire: If your Honor please, we are going to get to the Westerly conference when he finishes this.

The Court: Oh, that's all right. What is this now?

Mr. Maguire: I would like to put one more instead of coming up and just assume the answer is no, he has no personal knowledge.

Mr. Koen: On what?

Mr. Maguire: This next question, which is the same thing.]

Q. Mr. Garrity, do you have any personal knowledge as to the activities of the defendant during the time when he was on the Worcester Vice Squad?

Mr. Koen: My objection.

The Court: I will exclude it.

Mr. Maguire: And I make the same offer of proof, your Honor please.

The Court: All right. I haven't fully understood what that offer of proof was up here. You will have to come up.

Mr. Maguire: I was simply putting in the record what Mr. Garrity would say to that question if you would allow him to answer it.

The Court: That isn't an offer of proof. All you [906] are saying is what he would say, and it isn't any offer of proof. It doesn't offer to prove anything.

Mr. Maguire: I think it is a sufficient offer of proof in this case, if your Honor please.

The Court: Well, I'll exclude it. If I exclude it the jury will disregard it.

Q. One last question about this Isber conference, Mr. Garrity. Were you aware of the Treasury regulations that governed the conduct of such conferences between you and Mr. Isber? A. Yes, sir; in particular, the regulation requiring that all evidence except that of an incidental or supplemental character should be submitted in writing.

Q. Now, Mr. Garrity, you stated that at the time of the Isber conference the investigation had been completed about two months. You had, I take it, numerous dealings with Mr. Hurst in connection with this case while he was

investigating it? A. I met with Mr. Hurst, oh, between fifteen and twenty times.

Q. Did you ever have any conversation with Mr. Hurst relative to activities of the defendant during prohibition days when he was on the Worcester Police Department? A. Yes, I did.

Q. Will you tell us when, as best you can, and what the conversation was? A. The time would be some time early during 1952 or possibly toward the end of 1951. Mr. Hurst stated to me that he had [907] developed evidence indicating that when Mr. Massei was a patrolman back in prohibition days, that Mr. Massei took gifts or graft for the non-performance of his duties as a law enforcement officer.

I said, "Harold, I am willing to assume that he took gifts or graft from every liquor truck that rolled through the streets of Worcester; but that's no evidence against him for the period which you are investigating, namely, 1945 to 1950."

The Court: Now you will have in mind, Mr. Foreman and ladies and gentlemen of the jury, what Mr. Garrity says about that is correct, because the Government, because of the Statute of Limitations, no matter what he did, couldn't have prosecuted him before that date. No doubt about that, Mr. Maguire. Unless he waived it. I don't want to go into that. Under the mandate of the statute, this defendant had a right to insist—anyone has—that no prosecutions can go back beyond the 6-year period. As a matter of fact, in many of the crimes that are committed under our Federal jurisdiction three years is the maximum. Very few run to six, with the exception of treason. I think there is an exception to treason and possibly to murder. As I remember it, the Statute of Limitations doesn't run, Mr. Maguire, to murder. I may be mistaken about that. I mean to treason. It doesn't run to treason. It may run to murder. But I know on many of the others it runs from three years

and only to six years so far as tax evasion prosecutions are concerned, and so [908] far as failures arising out of tax evasion investigation are concerned. And I think, Mr. Maguire, you know what I mean by that, don't you? You have in mind the exemptions.

[909] Mr. Maguire: I am not sure I do, your Honor.

The Court: Beacon Brass.

Mr. Maguire: I heard of that, your Honor.

The Court: I have, too, but that is the reason why Mr. Garrity has a right. He had a right to say that because I would have to tell you you can't go back—in my charge to you, whatever transpired between 19-X date and before December 31, 1945 was not a matter before you, if you find certain things. Is that satisfactory to you?

Mr. Maguire: Yes, your Honor.

Q. Mr. Garrity, did you ever have any conversation with Mr. Hurst during this investigation relating to the activities of the defendant while he was on the vice squad of the Worcester city police? A. Yes. At the same time as the conversations about which I have testified which had to do with prohibition days, and I said—

Mr. Koen: Wait a minute. You have answered the question.

Q. What was the conversation, Mr. Garrity? A. I said that, "The same applies to his activities as an officer and head of the vice squad; that whatever you may have in your file indicating any gifts or gratuities pertaining to this officer's activities as a member of the vice squad, I don't care what it is, and I will assume you may have anything that you wish to [910] tell me, but it doesn't warrant a prosecution during the six-year period that you are investigating and does not bear on a source which you must show for that six-year period."

Q. Mr. Garrity, directing your attention, please, to this conference in Westerly at the safe deposit box, will you

please tell the Court and jury what happened there that day? Let me give you a few preliminaries. You rode down from Boston with Mr. Hurst and Mr. Calatrello? A. Yes.

Q. You arrived—

Mr. Koen: Let the witness testify.

Mr. Maguire: I will be glad to.

A. That is true. They picked me up at my home which, at the time, was in Jamaica Plain and I rode down to Westerly with both of the agents.

Q. Will you please tell us what happened when you got to the bank, the Washington Trust Company? A. Mr. and Mrs. Massei were waiting there for us in their automobile when we arrived in Westerly. Mr. Massei had the key to the safe deposit box and Mrs. Massei stayed out in their automobile outside the bank while the two agents, Mr. Calatrello and Hurst, and myself accompanied Mr. Massei into the safe deposit vault.

Q. Tell us what happened when you got inside. A. The agents identified themselves to the appropriate bank [911] official and we are admitted into a corridor off which the actual safe deposit vault was located. Messrs. Hurst and Calatrello and myself stood in the entrance of the safe deposit vault while Mr. Massei went in there with a woman who was in charge of the particular vault.

Q. A bank employee? A. A bank employee. Two keys were necessary to open the box. She used her key and he used his. The little door on the safe deposit box vault was open and the bank employee pulled the box out of the vault and while all of us observed, carried it into a conference room further down the corridor and placed it on the table and the four of us sat down, Messrs. Hurst and Calatrello on one side of the table and Mr. Massei and myself on the other.

Q. Now, please tell the Court and jury what happened there, what was said with particular reference to what you

heard Mr. Hurst and Mr. Calatrello testify to previously in this trial.

Mr. Koen: Wait a minute. I object. There are two or three questions involved. Can we have it broken down?

The Court: Would you mind breaking it down?

Mr. Maguire: I will be glad to. Tell us what happened, Mr. Garrity.

A. Mr. Hurst, I believe, but it might have been Mr. Calatrello, threw back the cover on the safe deposit box. As that was done, Mr. Hurst turned to Mr. Massei and said, "did you ever have any [912] money in here?" Mr. Massei said no. Mr. Hurst took the paper off the top of a file of papers which was in that safe deposit box and he described what the paper was, "This is a deed pertaining to such and such a lot of land—or a bill—" something of that nature, and Mr. Calatrello started writing on a list of paper the descriptions as Mr. Hurst dictated them. Mr. Hurst went through the complete contents of the safe deposit box and described, as Mr. Calatrello wrote, every item in the safe deposit box.

Q. Let me ask you this: Did Mr. Hurst ask Mr. Massei the source of the—

Mr. Koen: I pray your Honor's judgment.

The Court: No. Just what he said.

Q. What was the conversation, if any, Mr. Garrity?

Mr. Koen: Let's have it established, first, if there was a conversation, will you, please, Mr. Maguire, and then what the conversation was? I submit that that is the proper manner to do it, sir.

Q. Mr. Garrity, was there any conversation between the defendant and either Mr. Hurst or Mr. Calatrello? A. Yes, there was.

Q. Tell us what it was, please. A. I have already testified as to the question put by Mr. Hurst to Mr. Massei. Immediately after the box was opened and before Mr. Hurst

read off the description of the various papers that [913] were in that box. After the box had been emptied, Mr. Hurst asked Mr. Massei, "Does your wife have furs?" Mr. Massei replied, "Only a fur coat which she bought six or seven years ago which has since been remodeled."

Mr. Hurst asked, also, "Do you or your wife have diamonds or other jewelry?" Mr. Massei said, "My wife has a diamond ring which I gave to her many years back. Also back in the '20's I received a diamond stickpin as a present from a friend of mine who was in the theater business, a fellow named Greco, but I have long since disposed of that. I gave the stone in the form of a simple ring to a niece of my wife's."

That was the entire conversation. No, excuse me. There was one other item mentioned. Mr. Hurst, or probably Mr. Calatrello, said, "What is the approximate cost of the fixtures which—the icebox and stove, I think he said—which are in your summer cottage here in Westerly?" And Mr. Massei said, "Approximately $800."

That ended the conversation.

Q. Did Mr. Hurst ask Mr. Massei a question, "What is the source—"

Mr. Koen: Object.

Mr. Maguire: He says he has exhausted his recollection.

Mr. Koen: He hasn't said anything of the sort, may it please the Court.

Mr. Maguire: He says it was the entire conversation, if your Honor please.

[914] Mr. Koen: Well, that is different than stating that you have exhausted your memory, and you know it. I object to the question.

Q. Mr. Garrity, have you exhausted your recollection as to the conversation that took place in the safe deposit box on this day? A. Yes, sir.

Q. See if I can refresh your memory, Mr. Garrity. Did you hear Mr. Hurst ask Mr. Massei what is the—

Mr. Koen: Object.

The Court: No, the testimony. Did you hear Mr. Hurst testify.

Mr. Maguire: No, your Honor—

The Court: All right.

Q. Did you hear Mr. Hurst ask Mr. Massei in the vault that day, or in this conference room of the bank, "What is the source of the funds that were used to acquire all of your assets?" A. No, sir, he asked no such question.

Q. You are positive about that? A. I am certain of it.

Q. Did you, Mr. Garrity, state, or do you recall your stating that Mr. Massei got these funds during prohibition days when he let trucks roll through Worcester? A. There wasn't the slightest mention—

Mr. Koen: No, wait a minute, please. I pray your Honor's [915] judgment.

The Court: The jury may thoroughly disregard that answer. They should thoroughly disregard it. I don't want this witness to characterize answers.

Q. Did you make such a statement?

The Witness: Will you read the question?

[The question is read.]

A. I stated no such thing.

Q. You are referring now to this day in the vault? A. On that day.

Q. Did you hear Mr. Massei state that he got this money referred to back in prohibition days in the nature of a gift and that he didn't report it or didn't think it was taxable? A. He never said that.

Mr. Koen: I ask that the answer be stricken.

The Court: The answer may be stricken. It is for the jury to say whether he did or not.

Q. Do you recall his stating that, Mr. Garrity? A. I recall that he did not—

Mr. Koen: Answer yes or no, please.

The Witness: I recall that he did not.

The Court: Do you recall, Mr. Garrity, stating that to Mr. Isber on the day you were there and made a statement before him?

The Witness: I didn't say he got the money that way.

[916] The Court: No. Do you recall saying that to Mr. Isber; Yes or No?

Mr. Maguire: If your Honor please, I would like to interject. It isn't a question of an answer of Yes or No. He has already stated what his conversation was with Mr. Isber.

The Court: Do you recall telling Mr. Isber he got his money from bribes and gifts?

The Witness: I said—

The Court: No; do you? Yes or No. Do you remember telling him?

Mr. Maguire: If your Honor please, that is not a Yes or No answer.

The Witness: That is not a Yes or No question.

The Court: You please answer my question. I will withdraw it.

Mr. Maguire: Your witness.

Mr. Koen: Would this be a good time for recess, sir?

The Court: I think it would be a good idea to take a five-minute recess.

[Brief recess.]

Cross-examination by Mr. Koen

X-Q. Now, Mr. Garrity— may I have Government's Exhibits which were on the letterhead of the firm of Maguire, Garrity & Roche, Mr. Clerk?

[The Clerk hands documents to Mr. Koen.]

[917] Mr. Koen: Thank you.

X-Q. Mr. Garrity, from your direct testimony is it fair to say you are not without experience in tax matters? A. That's correct.

X-Q. And that you had experience both prosecuting and defending taxpayers on the criminal side of this court? A. That's right.

X-Q. And that you had experience in the administrative setup within the Bureau of Internal Revenue, representing taxpayers? A. Yes, sir.

X-Q. And so far as this particular case is concerned, sir, you were the attorney for Mr. Massei before the Bureau of Internal Revenue? A. Yes, sir.

X-Q. And you have sat here during the course of the trial with counsel for the defendant, Mr. Maguire, who is your associate in the practice of law? A. That's right.

X-Q. And of course you don't wish this jury to have the impression that you are not concerned with the outcome of this case, do you? A. No, I do not.

X-Q. No. You are, in addition to your concern as an attorney and a member of the bar, you are personally concerned with the outcome of this case; is that not a fact? A. No, sir.

[918] X-Q. Yes or No, please. A. No, not personally.

X-Q. I think in answer to one of Mr. Maguire's questions, sir, you said you were familiar with the statutes and regulations covering tax matters and you mentioned particularly and specifically one regulation, did you not? A. I believe so.

X-Q. Will you please, sir, tell me what that regulation was, again, which you mentioned? A. The regulation that evidence except of an incidental and supplementary nature must be submitted in writing.

X-Q. And may I show you this document, sir, and ask you to read this paragraph which, in this volume, Prentice

Hall, 1951, Federal Tax Service, Volume II, paragraph 21, 277, is the particular paragraph to which you referred both on your direct testimony and just now in answer to mine? A. You would like me to read it?

X-Q. Will you read it, sir?

The Court: You asked if that was the paragraph?

Mr. Koen: I asked first for him to read it and then ask if it was the one to which he referred.

A. "Evidence required—"

X-Q. No, read it to yourself, please. A. [Examining.] Yes. That is the one I had in mind to which I referred.

X-Q. And that is the one which you had in mind when you were [919] discussing or testifying concerning the conference with Mr. Isber? Is that right? A. That's correct.

X-Q. Now, sir, that applies to what? Will you read the first sentence of that paragraph? A. "Evidence required —"

X-Q. No, the first sentence of the paragraph. A. This is the heading. It is part of the first sentence, I expect.

X-Q. First sentence begins there, does it not? A. I don't think so. Here is the beginning.

X-Q. "No reduction in taxes proposed—" is the beginning, is it not? A. I will read that portion. I think there are some more words.

X-Q. You read what I ask you, please. A. "No reduction in taxes proposed nor increases in allowances for claims shall be made unless the evidence upon which such action is taken is submitted in writing and in verified form."

X-Q. Yes. Now, that is the regulation that you had in mind when you were telling me and Mr. Maguire of your knowledge of the regulations; correct?

The Court: Telling the jury.

Mr. Koen: Answering our questions; pardon me, sir.

X-Q. Is that right? A. I better—

[920] X-Q. Answer my question, if you will. A. Whether this is the regulation in effect in 1951 I don't know. I have got the regulation in my brief case.

X-Q. Get it, sir.

[Mr. Maguire hands a volume to Mr. Garrity.]

The Witness: Thank you.

A. [Examining] Yes. That is correct.

X-Q. Will you read that portion which you have marked with a pencil there, sir? A. "Evidence required to substantiate facts alleged in—"

X-Q. No, no. A. That is marked in pencil.

X-Q. Go ahead. A. "No reduction in taxes proposed nor increases in allowance of claims shall be made unless the evidence upon which such action is taken is submitted in writing and in verified form. All evidence except that of a supplementary or incidental character shall be submitted over the sworn signature of the taxpayer."

X-Q. Fine. Now, that, for the purposes of the record is Code of Federal Regulations, Title 26, Internal Revenue 601.4 and the subdivision is VIII; correct? A. Yes.

X-Q. Now, sir, tell me, please, did I understand you correctly to say that you asked for the conference with Mr. Isber on the 20th [921] of May, 1952? A. That's correct.

X-Q. And the purpose of the conference at that time was to determine whether or not the case, the report having been received, should go forward with a recommendation, or not, of criminal prosecution? A. Yes, sir.

X-Q. Is there anything in the regulation which you just read, sir, which deals with recommendations for criminal prosecution? A. I believe that this—

X-Q. No. In what you read, sir, is the phrase "criminal prosecution" or the equivalent of it contained in the section which you read, sir? A. Not in that section.

X-Q. No, sir. All right. You were not there at that con-

ference, sir, for the purpose of discussing any proposed reduction in taxes, were you? A. Not immediately.

X-Q. Not at that point, were you? A. Not at that point.

X-Q. And you were not there, sir, for the purpose of discussing an increase in an allowance of a claim, were you? A. That's correct.

X-Q. There is no question, sir, that you went there as the attorney representing Mr. Massei? [922] A. That is correct.

X-Q. You knew, did you not, the regulations which covered employees of the Bureau of Internal Revenue with reference to discussing matters with strangers to a taxpayer's matters? A. In a general way, certainly.

X-Q. And you knew, also, sir, there were criminal sanctions imposed upon employees of the Bureau of Internal Revenue if they discussed with third persons matters pertaining to an individual's tax affairs? A. No, I did not know that.

X-Q. You didn't know that? A. No.

X-Q. Knowing, sir, that administrative sanctions, at least, were imposed on employees of the Bureau of Internal Revenue, you nonetheless discussed this matter of Lieutenant Massei's with them; is that correct? A. With whom?

X-Q. With the employees of the Bureau of Internal Revenue. A. Yes, I did.

[923] X-Q. And from your experience in tax matters, sir, you knew that the regulations require the filing of a power of attorney? A. Yes, sir.

X-Q. Did you file a power of attorney? A. I have no recollection one way or the other.

X-Q. Well, sir, in the other matters where you had appeared before the Treasury Department, had you filed powers of attorney? A. I imagine so.

X-Q. Is there any doubt in your mind, sir? A. Is there

any doubt in my mind? I just don't know. I have represented many people before.

X-Q. All right, sir. In the matters pending before the Bureau of Internal Revenue was it your custom and practice to file powers of attorney? A. I would say yes.

X-Q. And the powers of attorney which you filed, sir, were more or less identical so far as verbiage was concerned; is that correct? A. I just don't know. I can't say that it was.

X-Q. I show you this document, sir, for the purpose only of refreshing your recollection [handing], and I ask you to examine that. [Witness peruses.] Do you recognize it? A. I recognize the documents; yes, sir.

X-Q. I show you another document and I ask you to examine that [handing]. [924] A. [After perusing] Yes, sir.

X-Q. Will you please, sir, examine the two documents there and compare the wording or the verbiage used in those two documents. A. [After comparing]. I have done it.

X-Q. Are they identical except as to the names of the personalities involved? A. I just don't know whether they are identical or not.

X-Q. Well, will you check them, sir?

Mr. Maguire: Are they identical, Mr. Koen? Perhaps we can save time.

Mr. Koen: Let the witness testify to it. I believe they are. Let him say so.

Mr. Maguire: Fine!

The Witness: Substantially identical. I am not certain they are identical but I would say I can see certain insignificant differences but substantially they are identical.

X-Q. All right. Now, by the way, when did you first appear in this case involving the tax matters of Lieutenant Massei? A. Early November, 1951.

X-Q. What do you mean, sir, by early November, 1951? A. Toward the beginning of the month.

X-Q. Can you help us a little more specifically, sir? A. No. I recall the testimony of the Agents, and I'd say that the dates they specified were probably accurate. I know nothing to contradict that testimony on that point.

X-Q. Do you remember what dates, sir, they specified now? [925] A. Some time, I believe, about 7th, 8th, or 10th, of November.

X-Q. That is your best recollection now, that it was the 7th, 8th, and 10th of November? A. I believe that's what they stated.

X-Q. You sat here all during the trial? A. No, sir, I have not.

X-Q. When the agents were testifying at least you were here? A. I believe so.

X-Q. You were here when Mr. Ierardi was testifying? A. Yes, I was.

X-Q. Did you hear Mr. Hurst testify? A. That's right.

X-Q. Did you hear Mr. Calatrello testify? A. That is correct.

X-Q. And the best you can give us now as to your memory of dates is somewhere between the 7th, 8th and 10th of November? A. That's correct.

X-Q. Well, do we agree, sir, or can we agree that it was your practice to file powers of attorney in tax matters before the Treasury Department? A. Yes, sir.

X-Q. And having those two documents before you— By the way, what are the dates of those? A. You ask me to read the dates into evidence?

[926] X-Q. Yes. A. July 27, 1951; October 3, 1951.

X-Q. Now, sir, with those two documents in front of you and having in mind there is no substantial difference in the verbiage, as you put it, and having in mind it was your practice and custom to file powers of attorney, can you

now say with reasonable certainty that you did file a power of attorney in this case in that form, or substantially that form? A. No, I cannot.

X-Q. You cannot. Well, whether you filed a power of attorney or not, sir, is it fair to say you were engaged by the defendant? A. Yes, sir.

X-Q. To appear and to represent him before the Bureau of Internal Revenue, and to speak in his behalf concerning the tax matter that was his and was pending at that time? That's fair to say, isn't it? A. I think— I'd like that question read, please.

Mr. Koen: Read it back to him, Mr. Reporter.

[The last question is read.]

A. I was engaged as his attorney—

X-Q. No, answer my question. A. What he had in mind I don't know.

Mr. Koen: I press the question, may it please the Court.

The Court: You may read the question again. If you [927] can't answer it, Mr. Garrity, say so; if you can, why answer it.

The Witness: Yes, sir.

[The question is again read.]

A. I don't think that is fair to say.

The Court: Well, you were engaged by the defendant, weren't you?

The Witness: Yes, sir.

X-Q. And you were engaged by him in connection with the tax matter which was pending before the Bureau of Internal Revenue? A. Yes, sir.

X-Q. And you represented him before the various representatives of the Bureau of Internal Revenue, didn't you? A. In certain respects, yes. I represented him. I furnished Mr. Hurst with the letters that he requested. I got information from the taxpayer, and so forth. Of course I did.

X-Q. You represented him, sir? A. Yes, sir.

X-Q. And in the course of representing him you spoke in his behalf and presented to them his aspect of the case? A. What do you mean "his aspect of the case"? I don't understand your question.

X-Q. Well, I'm sorry if my choice of words is not as good as yours, sir.

Mr. Maguire: He didn't say that, Mr. Koen.

Mr. Koen: I think he did. I didn't make my thoughts [928] clear to him, and I guess it's my deficiency.

Mr. Maguire: I'll be prepared to go along with that.

Mr. Koen: Of course you would.

The Court: Let's have the question. Read the question.

Mr. Koen: Read the question, Mr. Martin.

[The following question is read:

"And in the course of representing him you spoke in his behalf and presented to them his aspect of the case?"]

X-Q. Will you answer that question? A. I said already you have got two questions.

Mr. Koen: All right, sir, I withdraw the question.

X-Q. In the course of representing him and appearing before the Bureau of Internal Revenue, sir, you spoke in his behalf and presented the facts which were most beneficial to him? A. There are two parts to your question. I spoke in his behalf. Yes, I did.

X-Q. Fine! A. Now the second. I presented certain information favorable to his aspect of the case? No. I simply presented all information that Mr. Hurst requested that I present, whether helpful or harmful. I should have said I spoke *on* his behalf, not I spoke *in* his behalf.

X-Q. I show you Government's Exhibit No. 39, sir, and particularly at this time I am referring to a letter dated November 15, 1951. [929] Using that to refresh your recollection, sir, do you remember going to the office of

the Bureau of Internal Revenue and talking to Mr. Ierardi on about the 8th of November? A. Yes. It says the 9th, November 9th.

X-Q. All right. And did you tell Mr. Ierardi on that day that you expected to confer with Mr. Massei on the next day? A. I believe I did.

X-Q. And did you also tell Mr. Ierardi that you expected after a conference with Mr. Massei that powers of attorney would be executed? A. I don't doubt it. I have no particular memory of it, but I may very well have. I don't doubt Mr. Ierardi's testimony on the point.

X-Q. Would you say that was so, that you will accept Mr. Ierardi's testimony that you said that? A. I will accept Mr. Ierardi's testimony, yes.

X-Q. Now, sir, having that in mind, did Mr. Massei come into your office the next day? A. I don't recall.

X-Q. Do you know when next Mr. Massei did come into your office, sir? A. I really don't.

X-Q. All right. Did you prepare a power of attorney in this case? A. I imagine I did, but I don't remember one way or the other.

X-Q. Was it your custom when you prepared powers of attorney in [930] tax matters of this sort, sir, to retain a carbon copy for your files? A. I think it probably was.

X-Q. Have you looked through your files, sir, to find out if you now have in your possession, or Mr. Maguire has in his possession, a retained copy of a power of attorney that might have been prepared in November, 1951, in the Massei case? A. Yes, sir, I have.

X-Q. Is there one present? A. No, sir, there's not.

X-Q. Is there any indication that one was prepared? A. None; no covering letter or other indication.

X-Q. All right. Is it your memory now, sir, that you didn't talk to Mr. Ierardi on the 8th of November? A. That I did not?

X-Q. Yes. A. No. As I say, I accept Mr. Ierardi's testimony, and I could recall substantially the events to which he testified when he testified to them.

X-Q. Including the fact that you said you were going to get a power of attorney? A. Yes, sir, I don't doubt it. I just don't remember it.

X-Q. All right. This letter of November 15, 1951, sir, contains information relating to the finances of Mr. Massei, does it not? A. May I see it?

[931] X-Q. Yes, sir [handing]. A. [After perusing] Yes, it does.

X-Q. And that information was obtained from the Masseis; is that correct? A. Yes.

X-Q. Now you had some conference with Mr. Massei about assets, did you not, or his finances, as revealed in that letter? A. Yes.

X-Q. And then at some time you conferred with Mr. Hurst again, and he asked you more specific questions, did he not, and you answered them by the letters of November 19, 1951? A. That is correct.

X-Q. The information had been sought by Mr. Hurst and he asked you to obtain it? A. I don't know that he sought it. He asked—what he did toward seeking it, if anything, before asking me to get it, I do not know, but he asked me to get it, and I got it.

X-Q. And you obtained it from whom? A. Mr. and Mrs. Massei. May I look at it?

X-Q. You go ahead. A. It may be that some of the answers here I obtained from persons other than the Masseis. [Examines letter.] I believe that with reference to the purchase of the automobiles, I got some of that information from one or more of the automobile dealers.

[932] X-Q. Predicated on information obtained from the Masseis? A. I believe that the Masseis told me the dealers from whom the cars were purchased and the approximate

dates, and I got the precise figures from the dealers themselves.

I want to look at one other thing here.

X-Q. Surely.

The Court: Take your time now. You look it over. Don't hurry. Take all the time you want, Mr. Garrity. Don't feel at all hurried.

A. [After pause.] I spoke to—with reference to the loan to the brother, I spoke to the brother as well as to Mr. and Mrs. Massei. That is the brother Edward.

X-Q. And under date of November 28th, in response to a request by Mr. Hurst, you gave Mr. Hurst Mr. Massei's employment record with the Worcester Police Department and others? A. Yes, sir.

X-Q. Now that you received from whom? A. Partly from the Masseis; partly, I believe, from a scrap book of newspaper clippings which was kept by Mrs. Massei, and I think that's the complete source of that,—I believe.

X-Q. Well, sir, you certainly didn't get from any scrap book anything with reference to the Lincoln Park Amusement Company, covering the employment of Mr. Massei from 1916 to 1917, did you? A. I would say that I did not.

X-Q. Nor did you get from that source the information concerning his employment in 1917 and 1918 with the American Steel & Wire [933] Company? A. No, sir.

[934] X-Q. In the main would you say that the information which you received there came from the Masseis? A. Yes.

X-Q. Now, the information contained in the letter of December 11, 1951, sir, with the exception of the first item, was the contents of that letter received or written, rather, on information received from the Masseis? A. No, sir. The statement came from the police department.

X-Q. I excluded that from my question. A. A photostat

came from the Worcester County Trust Company in both instances, I believe.

X-Q. Did you have permission to get that photostatic copy of that account from the Masseis? A. Yes, I did.

X-Q. All right, sir. And the information contained in your letter of December 6, 1951, sir, that came from your conferences with the Masseis; is that correct? A. In its entirety, yes.

X-Q. So that it is fair to say, is it, sir, that from time to time after you had conferred with representatives of the Bureau of Internal Revenue, you would obtain information and facts from the defendant for presentation to the Bureau or Mr. Hurst? A. Yes, sir.

X-Q. If I may, sir, may I direct your attention to the conference at the safety deposit box in Westerly, Rhode Island, on what [935] date was it? A. November 20-something, 1951.

X-Q. Is that the best you can do for us on the date, sir? A. I think it is the 27th.

X-Q. Are you sure? A. Not 100 per cent; no. That is my best recollection.

X-Q. You are not sure of the date, sir, and yet you stood for 20 minutes on that stand and told us in detail the conference held in the safe deposit box of that bank; that is correct, isn't it? A. Yes, sir.

X-Q. And you have had, sir, have you not, through the course of this trial the benefit of hearing testimony on the stand and reading the transcript of the witnesses and their testimony either through the night or the next morning before we come into court? A. I have not read the transcripts but I did listen to the testimony.

X-Q. And you made notes? A. Yes, I did.

X-Q. And you made notes in great detail concerning the transaction at the Westerly, Rhode Island bank? A. Actually, not.

X-Q. And you have had the benefit, have you not, of a copy of the excerpts from Mr. Hurst's diary? [936] A. Yes.

X-Q. As I understand it, so far as the date November 27th, 1951 is concerned, sir, and that was the date, you concur with everything that Mr. Hurst and Mr. Calatrello say except that there was any conversation between them and Massei and yourself and Hurst and Calatrello? A. That is not correct.

X-Q. In what other details do you not concur? A. I remember specifically—

X-Q. No, I asked a question. In what other respects? Not what you remember. A. With respect to whether or not Mr. Calatrello was in any way rushed at the conclusion of the conference at the Westerly bank. In that respect.

X-Q. Outside of that, everything else you are in agreement with? A. I am not sure. I would like to think for a moment.

X-Q. You may. A. [Pause.] I believe that there is one other particular in which I am not in agreement with Mr. Hurst. He testified—

The Court: No, no. You can tell what it is.

A. [Continued] The respect is the discussion with Mrs. Massei after we left the bank.

X-Q. No, I am talking about in the vault. A. In the box itself I think I am in disagreement in another particular and that is I do not recall their testifying as to [937] certain jewelry which they asked about and which I do remember.

X-Q. Is it your statement, then, sir, they did not testify to the jewelry? Is that what you mean? A. I don't recall their testifying at least to the details which I could recall.

X-Q. Well, answer my question. Is it your position now, sir, they did not testify to the jewelry? A. It is my position that they didn't in the detail that I did.

Mr. Koen: I didn't ask you that, and I ask that the

answer be stricken and ask the witness be ordered to answer the question.

The Court: I will have the answer stricken and the question may be read.

[The question is read as follows: "Is it your position now, sir, they did not testify to the jewelry?"]

A. No, that is not my position.

X-Q. Well, would you agree, sir, that they did speak about jewelry and a fur coat, both Mr. Calatrello and Mr. Hurst? A. No, I won't. I don't think they did.

X-Q. All right, sir. You mean your memory is faulty in that respect? You can't remember? A. That is correct.

X-Q. All right, sir. Mr. Maguire, I am reading at page 860 of the record. At the bottom of the page.

[938] "You see—" and this is, I think, Mr. Calatrello—yes. "You see, I was completing the inventory here and I had completed it when Mr. Hurst spoke to Mr. Massei about, oh, a fur coat and some jewelry and also about an icebox and a stove and a kitchen set in Westerly for the new house."

You didn't remember that, sir?

A. Now that you read it, I remember it.

X-Q. You didn't remember it when I first asked the question? A. No, sir.

X-Q. All right. A. I mean that is not correct. I didn't remember the details is what I am trying to say.

Mr. Koen: Will you read back the last series of questions and answers so that I will know what the witness said?

[Questions and answers read; from line 18, page 937 to line 23, page 937.]

X-Q. Your position in that series of questions was that they did not mention the jewelry and the fur coat; correct? A. Both of them didn't. Perhaps Mr. Hurst did, I don't know. Obviously Mr. Calatrello did. How about Mr. Hurst?

The Court: I think we will pause here because it is four o'clock and, with the usual admonition, Mr. Foreman and Ladies and Gentlemen of the Jury, that you refrain from forming any opinion whatsoever because, remember, I have to charge you [939] on the law and counsel will argue, Mr. Koen for the government and Mr. Maguire for the defendant, so it is only fair, in the interests of simple justice, that you refrain from forming any opinion.

I am going to let you get away because it is a stormy day and it will give you a chance to get a little bit of a head start. There is a meeting of the Judges at 10 o'clock sharp tomorrow morning. I have to be in Judge Sweeney's lobby at 10 o'clock and it is from 10 to 10:30 so you are safe until 10:30.

[Adjourned to 10:30 a.m. Tuesday, April 17, 1956.]

[940] ELEVENTH DAY

Court Room No. 5,
Federal Building, Boston.
April 17, 1956.

The Court: Good morning, Mr. Foreman and Ladies and Gentlemen of the Jury. All right, Mr. Koen.

W. ARTHUR GARRITY, JR., Resumed

Cross-examination by Mr. Koen, Continued

X-Q. Now, Mr. Garrity, I think you said yesterday, I asked you some questions concerning some statutes which imposed both criminal and administrative sanctions upon employees in connection with tax matters; do you remember? A. Yes, sir.

X-Q. And your answer was you were not aware of those statutes? A. Criminal sanctions, yes.

X-Q. I call your attention to Title 26 of the United States Code, which is commonly referred to as the Internal

Revenue Code, Chapter 7213, sir. What is the title of that, may I ask? A. "Unauthorized disclosure of information."

X-Q. Will you read that to yourself, sir? A. [Examining.] I have read it. The whole thing? The first paragraph?

X-Q. Just the first paragraph. And that provides for dismissal from the service and the imposition of a penalty, doesn't it? A. Yes, it does.

X-Q. And that deals, does it not, sir, with employees of the [941] Bureau of Internal Revenue and the Treasury Department, among others? A. Yes, sir.

X-Q. I call your attention, if I may, to Title 18 of the United States Code, Section 1905, and I ask you to examine that, sir.

The Court: Is that the one, Mr. Koen, that deals with penal sanctions arising out of a disclosure by other persons in the government service?

Mr. Koen: Yes, sir.

The Court: I will take judicial notice of the fact that is so.

Mr. Koen: Fine.

The Court: Let him look at it, though, as long as you have started.

The Witness: (examining). I have read it. "Disclosure of confidential information generally" is the heading.

The Court: By anyone in the government service. That includes a United States Attorney, Assistant United States Attorney, any person in the government service who discloses confidential information. Any person who occupies an executive position of a branch of the government of the United States, and may it be read to the jury so that there will be no misunderstanding?

X-Q. Will you read it, Mr. Garrity, please? A. [Reading]

[942] *"Disclosure of confidential information generally.* Whoever, being an officer or employee of the United States or of any department or agency thereof, publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association; or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; shall be fined not more than $1,000, or imprisoned not more than one year, or both; and shall be removed from office or employment."

X-Q. May I have the provision of Title 26 read into the record? Will you read the first part of that, Mr. Garrity, please? A. [Reading]

"Unauthorized disclosure of information.

(*a*) *Income returns.*—

[943] (1) *Federal employees and other persons.*—It shall be unlawful for any officer or employee of the United States to divulge or to make known in any manner whatever not provided by law to any person the amount or source of income, profits, losses, expenditures, or any particular thereof, set forth or disclosed in any income return, or to permit any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined

by any person except as provided by law; and it shall be unlawful for any person to print or publish in any manner whatever not provided by law any income return, or any part thereof or source of income, profits, losses, or expenditures appearing in any income return; and any person committing an offense against the foregoing provision shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $1,000, or imprisoned not more than one year, or both, together with the costs of prosecution; and if the offender be an officer or employee of the United States he shall be dismissed from office or discharged from employment."

[944] X-Q. Because of those statutory provisions, Mr. Garrity, powers of attorney are requested of parties appearing in behalf of taxpayers; is that correct, sir? A. I assume that it is for that reason, and others.

X-Q. Among others. And because of the requirement, sir, you have on other occasions filed powers of attorney; that is correct, is it? A. Yes.

X-Q. As a matter of fact, I showed you two yesterday? A. Yes.

X-Q. Which you identified as having been filed by you prior to the time that you entered the case as the agent of Mr. Massei; is that correct? A. Yes.

X-Q. And I think you said yesterday, sir, that there was no great difference, if there was any, in the contents of the power of attorney, those two powers of attorney; is that correct? A. Yes, it is.

X-Q. Is it fair to say, sir, that in this case you filed a power of attorney in much the same form as those two? A. I don't know, but I imagine I did. I will say it is fair to say I probably did.

X-Q. All right. I have taken the liberty of making a copy of these two powers of attorney which you have filed

in previous cases, and I ask you, if you will, to compare the copy which I [945] have made with each of the originals that you have there, sir. I have deleted, as you can see, the name of the taxpayer,—I mean, that is blank, and so is that of the agent. A. [After comparison] I have seen them, yes.

X-Q. In substance, sir,— A. What is the question?

X-Q. In substance, sir, is that blank power of attorney which I have given to you the same in content as the other two? A. Yes, it is.

X-Q. And if you filed a power of attorney that would be the type of power of attorney which you filed, you say? A. No, I don't think I said that.

X-Q. What did you say? I'm sorry. A. I said I have no memory of it.

X-Q. Yes. A. Period.

X-Q. Didn't you say that you probably did? A. Oh, yes, I said I probably did file a power.

X-Q. All right. Now, if you probably filed one, would that be the form and content of the one which you would have filed, sir? A. It might have been but I don't—I say not necessarily.

X-Q. Is it fair to say, based on the two originals which I have presented to you, together with a copy of the form which I have presented to you, that if you filed a power of attorney it would be in the same tenor and to the same extent as appears on that [946] blank? A. I would say again, probably it would but I can't say with certainty.

X-Q. Well, is there any question, sir, that Lieutenant Massei appointed you his attorney to represent him before the Treasury Department? A. Yes, I think there is a question on that.

X-Q. Well, is there any question, sir, that you did represent him before the Treasury Department? A. No, on that I think there is no question.

X-Q. But you still say there is a question whether he appointed you? A. I simply cannot recall.

The Court: Well, apart from the writing, Mr. Garrity, when you went there—don't misunderstand me. No inference is to be drawn here. Apart from any memorandum of existence of a power of attorney you wouldn't have gone there unless you had the authority of your client to go and speak; isn't that right?

The Witness: I think that is correct, your Honor.

The Court: So that when you did go there, you went there apart from the writing with the authority to represent him? Let's put it that way.

The Witness: By reason of his having employed me, your Honor, as his attorney.

The Court: That's right. And of course you knew what the regulations were, as you have already told the jury? [947] The Witness: I certainly was aware of them in general. I can't say I knew every one of them.

The Court: And you told this jury that you probably filed that?

The Witness: Yes, sir. Yes, your Honor.

The Court: All right.

X-Q. And, sir, because he employed you as counsel, it was incumbent upon you, was it not, to do all acts necessary to protect him in the matter? A. Yes, sir.

X-Q. It was also part of your duty, was it not, to deliver, and you did deliver to the Treasury Department, certain documents based on information obtained from Mr. Massei? A. Well, may I—I think there are two questions there. I certainly did deliver those things, but I can't say that I considered that my duty.

X-Q. Well, you received certain documents, did you not, from the Treasury Department in connection with the tax matter involving Lieutenant Massei? A. I can't—I don't remember offhand receiving documents from the Treasury.

X-Q. Well, sir, will you check your memory and make certain whether you did or not? A. Well, the Treasury agents did return to me documents that I had initially delivered to them.

[948] X-Q. Yes. Anything else, sir? A. That they furnished to me? I can't think of anything offhand.

X-Q. That is, your memory now, sir, is that you received from no member of the Bureau of Internal Revenue Service any documents as the attorney for Mr. Massei; is that your best memory, sir? A. Yes, except for those documents which I gave to them in the first instance.

X-Q. That's right. That is your present and your best memory? A. Let me think for one moment.

X-Q. Oh, yes, sir. A. I can't think of any. That is my best memory.

X-Q. I show you this document, sir, and I ask you to whom that is addressed? A. It is addressed to me.

X-Q. And the date, sir? A. Oh, it's mailed January 1, 1952.

X-Q. Pardon me? A. Oh, excuse me. January 21, 1952.

X-Q. And addressed to whom, sir? A. Me.

X-Q. With reference to what, what matter? A. William V. and Isabel C. Massei, 29 Chrome Street, Worcester.

X-Q. And the letterhead of that, sir? [949] A. Treasury Department, Internal Revenue Service, Boston 10, Mass.

X-Q. And what is the subject, sir, of that? A. May I read it?

X-Q. No, just give it to us generally, if you will. A. This is a letter—oh, asking that in general I obtain the waiver of Mr. and Mrs. Massei to the statutory limitation on the assessment of income taxes against them for the year ending December 31, 1948.

X-Q. And with that, sir, were furnished some forms for completion by the Masseis; correct? A. Yes.

X-Q. You obtained the signatures to complete those forms; is that correct? A. Yes.

X-Q. From whom did you obtain those signatures, sir? A. Mr. and Mrs. Massei.

[950] X-Q. And you returned the consents, fixing the period of limitation, to the Bureau of Internal Revenue? A. Either they mailed them or I returned them, I don't remember which; one way or the other.

X-Q. But you had the forms completed as a result of a letter from the Bureau of Internal Revenue? A. Yes.

X-Q. And you have no memory now, sir, as to whether you returned them or whether they were forwarded to the Internal Revenue Service directly by the Lieutenant? A. That's correct.

The Court: Could I see counsel for a minute? Come up, Mr. Mahony and Mr. Hassan.

[Conference at the bench on another matter.]

X-Q. Now, Mr. Garrity, yesterday afternoon when you were testifying, and I am referring to page 897 of the record, Mr. Maguire, this appears in the testimony:

> "The defense of the taxpayer, I said to Mr. Isbor, in this situation is that all of the cash which he expended during the six-year period from 1945 to 1950 was in his possession at the beginning of 1945."

Do you remember saying that, sir? A. Yes.

X-Q. Did I understand also yesterday, in the course of your testimony, that you had no personal knowledge of Lieutenant [951] Massei prior to November 8, 1951? A. I think that answer was ruled out.

X-Q. I see. Then forgive me.

The Court: I don't think so.

Mr. Maguire: No, I don't think that question was asked, your Honor.

Mr. Koen: I will withdraw the question so we won't get into any lengthy discussion.

The Court: No. I don't remember ruling it out and if I did, I would rule it in.

Mr. Maguire: That question was not asked, your Honor.

The Court: I wouldn't object to it, anyway.

Mr. Koen: I am wrong; I'm sorry and I apologize to everybody.

The Court: There is nothing improper about it, whether he knew him or didn't know him.

X-Q. Now, sir, that was the taxpayer's defense as you described it; correct? A. Yes, sir.

X-Q. And that was predicated on information received from Lieutenant Massei? A. Yes, sir.

X-Q. So that Lieutenant Massei told you that he was in possession of this money at the beginning of 1945; is that the way you left it yesterday? [952] A. Yes.

X-Q. Now, sir, when he told you that, and you were his attorney at the time? A. Yes.

X-Q. Did you ask him when he received the money? A. No.

X-Q. You didn't ask him? A. No.

X-Q. Did you ask him where he was when he received the money? A. No, sir.

X-Q. Did you ask him from whom he received this money? A. No, I did not.

X-Q. Did you ask him for what services or non services he received this money? A. No.

X-Q. Then you wish to leave it, sir, that you took the statements and did not inquire nor did you make any independent investigation as to when, where, from whom and for what he received these monies; is that—? A. That is correct.

X-Q. And you were his attorney at that time? A. That is correct.

X-Q. And without any support other than that, sir, you presented that as a defense in behalf of Mr. Massei to the

Internal Revenue Service all during the time that you represented him, from November 8, 1951 to and including the conference on the [953] 20th of May, 1952? A. That is not correct. I had support in addition to the statements that you have quoted.

X-Q. That you got from Mr. Massei? A. Yes, sir.

X-Q. Then you did inquire as to the source? A. No. I inquired as to after 1945, as to whether he had received anything over and above what was on his tax returns for the period from 1945 to 1950.

X-Q. Did you tell the agents at any time, sir, and by "agents" I mean agents or representatives of the Bureau of Internal Revenue, that he received nontaxable income during the calendar years 1946 to 1950 inclusive? A. Not as a definite statement. I told them that I understood from the—

X-Q. No, no, please. I asked you the question— A. No, not the way you put it, Mr. Koen.

X-Q. Did Massei ever tell you he received nontaxable income during the calendar years 1946 to 1950 inclusive? A. No, he did not.

Mr. Koen: Pardon me, sir, just a moment. [Brief pause.]

X-Q. By virtue of his father's death, Lieutenant Massei came into the ownership of one-half interest in a house in Worcester; that's correct, isn't it? A. Yes.

[954] X-Q. And he remained the owner of that through the calendar year 1950? A. Yes.

X-Q. Now, sir, did Lieutenant Massei ever tell you about any other nontaxable receipts other than the house which we have just discussed here? A. No.

X-Q. Did you ever tell the agents about any other nontaxable receipts during those calendar years? A. From 1945 through 1950?

X-Q. Calendar years 1946 to 1950. A. I don't think so. I think not.

X-Q. So that it is fair to say, sir, that outside of the house there were no other nontaxable receipts, so far as Lieutenant Massei was concerned, from 1946 to 1950 inclusive? A. That I do not know. I know that he did not—to the best of my recollection he did not tell me of any. May I qualify that answer?

X-Q. Oh, yes, sir, of course you may. A. He may have mentioned that a portion of the loan that he had initially made to his brother was returned during that five or six-year period and which would have been a nontaxable receipt. That is a possibility.

X-Q. When was the loan made, sir? A. I am not sure. I think perhaps—I really don't recall [955] when it was made.

X-Q. Give us your best memory. A. Toward the end of the period. Perhaps 1948 or 1950, I am not sure which. [956] X-Q. You are not sure what year this loan was made in? A. That is correct.

Mr. Koen: I don't believe I have any further question.

The Court: Mr. Garrity, you were here when Mr. Isber testified; isn't that right?

The Witness: Yes, your Honor, it is.

The Court: You remember—I'm reading, Mr. Maguire, and I do this without any indication of any point of view on my part—I'm reading from the bottom of page 826:

"Attorney Garrity came in to see me and evidently—"

this is Mr. Isber's testimony—

"—I called Mr. Hurst, inviting him to come in, so he was present. Mr. Garrity stated that the taxpayer was retired from the police force as of the date of the conference and that he was not—although he

wasn't in the best of health, he was at present building his home."

You remember that?

The Witness: Saying that?

The Court: Yes—no, Mr. Isber saying that.

The Witness: I do, yes.

The Court [reading]:

"He said that his client had been attached to [957] Headquarters Squad where he had about five men under him and it was the Vice Squad; that he was attached to this Vice Squad from April of 1932 to March of 1933, and that in 1934 he was back on the Vice Squad again until 1936; that he was removed from the Vice Squad but returned to the Vice Squad in January of 1938, and remained there until June of 1943."

You remember that testimony?

The Witness: I remember his testimony, yes, your Honor.

The Court [reading]:

"Mr. Garrity further stated that the taxpayer had been a sergeant in charge of the Vice Squad and, as a sergeant in a vice squad, was in a position to obtain gifts or graft; that he was the number one man responsible for gambling supervision in Worcester."

Now you heard Mr. Isber testify to that?

The Witness: Yes.

The Court: At the top of page 828:

"The attorney"—meaning you—"referring to Mr. Garrity, pointed out that the taxpayer lived like a pauper and was therefore able to accumulate enough money prior to 1947; that the taxpayer [958] earned less than $3,000 a year during that period."

You remember him testifying to that?

The Witness: I remember his testimony, your Honor.

The Court: That's right. [Reading:]

"Mr. Garrity further stated that the taxpayer had told him that he received gifts from many people and that during prohibition while the taxpayer was on the Vice Squad, every truck loaded with liquor that passed through the main street of Worcester would make a gift to the taxpayer and that the taxpayer believed that the gifts were not income and therefore were not reported as such."

Now, do you remember being asked this question—or do you remember Mr. Isber testifying as follows:

"I asked Mr. Garrity why the taxpayer paid large sums of money for insurance in cash and he replied that a smart insurance salesman persuaded the taxpayer and several others that this was a good way to hide cash and that—in substance, his reason for that."

Now you say that that conversation never took place; is that right?

The Witness: No, I do not, your Honor.

The Court: You agree Mr. Hurst was present in the office?

[959] The Witness: Yes.

The Court: You heard Mr. Hurst testify?

The Witness: Yes, your Honor.

The Court: Now, you also—in other words, you never told him that—

The Witness: I don't say that, your Honor.

The Court: No, no, you never told them that he collected graft and gifts in the performance of his duties as a police officer?

The Witness: That never was a statement of fact, your Honor.

The Court: No, no, but did you ever tell Mr. Isber that?

The Witness: What?

The Court: What Mr. Isber testified to? No, did you, yes or no? You have already told—on direct examination you said you didn't. I am not passing upon it.

The Witness: It's out of context, your Honor.

The Court: No, did you? Yes or no?

The Witness: I said—

The Court: No, did you, yes or no, say what Mr. Isber said—please?

The Witness: Are you talking now about the specific statement?

The Court: Yes.

[960] The Witness: Any specific statement? Yes, I did say what Mr. Isber testified to.

The Court: All right. Now—

The Witness: In some instances, but not in every instance, your Honor.

The Court: I am talking about the instances that have been recited by Mr. Isber. I am doing this in fairness to everybody. I am talking about the instances recited by Mr. Isber under oath in the presence of Mr. Hurst and corroborated by Mr. Hurst, testified to by Mr. Hurst—let me put it that way—that you did talk about his sources of income and his opportunities for graft and gifts. Did you say that?

The Witness: I did not talk about his sources of income, your Honor, but I did talk about opportunities for gifts and graft hypothetically.

The Court: So you never told, you say now under oath, that you never told Mr. Isber what Mr. Isber has testified to in the presence of Mr. Hurst?

The Witness: No, I do not, your Honor.

The Court: That's right.

The Witness: I believe Mr. Isber. Let me—

The Court: No, no.

The Witness: Let me make that clear.

The Court: No, did you ever give that kind of testimony?

Mr. Maguire: If your Honor please, I think you ought [961] to let him explain.

The Court: Well, I am asking him a simple question.

Mr. Maguire: I don't think he is able to—

The Court: Well, I'll permit him. Go ahead, Mr. Garrity. I'll permit him to explain. You don't object to that, do you, Mr. Koen?

Mr. Koen: No.

The Witness: With reference to Mr. Isber's testimony—

The Court: They are both members of the bar, and I just want to have the situation put before the jury, so there'll be no misunderstanding.

The Witness: With reference to Mr. Isber's testimony, I do not claim, nor have I ever thought for one moment, that Mr. Isber has been in any sense falsifying anything that I said.

The Court: I don't want that, see. All I want you is to answer a simple question.

The Witness: I do not believe that. I state this as my explanation, your Honor—that the words used by him to refresh his memory were taken out of context, and my position apparently was misunderstood by Mr. Isber.

The Court: Is that the explanation you want to make?

The Witness: Yes, your Honor.

The Court: Now, do you remember Mr. Hurst testifying? Were you here when he testified about going down to Westerly, Rhode Island?

[962] The Witness: Yes, your Honor.

The Court [reading:]

> "Among other things I asked Mr. Massei the source of all the money, or words to that effect."

And he was there, wasn't he?

The Witness: Mr. Hurst was there?

The Court: No, Mr. Massei was there?

The Witness: Yes.

The Court: As a matter of fact, you got the key from Mrs. Massei to open the box; isn't that right? And she remained out in the car?

The Witness: No, your Honor, he came in with us and opened the box with his own key.

The Court: His own key, that's right. [Reading:]

"And he replied that the money came from many different people at different times."

Do you remember that?

The Witness: Definitely I do not.

The Court: Well, this is at page 611.

The Witness: I remember the testimony.

The Court: That's right.

The Witness: I remember the testimony.

The Court: [Reading:]

"Q. Have you finished?

The Court: Go ahead. I believe he also said many years ago.

[963] "Mr. Maguire: Just a minute.

A. [Continued]. My recollection is he said many years ago, in the same sentence.

Q. What next happened? A. Mr. Garrity interrupted or broke into the sentence and he said that he got this money for letting liquor trucks roll down Shrewsbury Street in Worcester, in substance."

Now didn't you testify under oath that conversation never happened outside that box?

The Witness: Yes, your Honor, I did.

The Court: So that, if that was testified to by Mr. Hurst and by the agent with him, that was not a correct statement, was it—you never said that, and Mr. Massei made no comment of any kind?

The Witness: That is absolutely true.

Mr. Maguire: I think that is all, Mr. Garrity.

Mr. Koen: Well, I would like to ask just one question, if I may.

The Court: I'll tell you what I'll do. I have been tied up. I'm going to take a recess because I have been jammed up since before 10, and I would like to have a conference with counsel up here at the bench. The jury may go.

[Recess beginning at 11:25.]

[964] [Conference at the bench:

The Court: Are you going to straighten it out?

Mr. Koen: I am not going to ask any more questions.

The Court: What about the situation which I raised about the house? You feel it should be left as it is?

Mr. Koen: I think the way the testimony is, it is that the house came to him on the death of his father in 1949 and remained his during the calendar year 1950.

Mr. Maguire: I will ask him a question.

The Court: How about the fact that he admits he also talked about the way he lived, as a miser? There is no dispute over that, is there?

Mr. Maguire: No.

The Court: If he admits that, it is obvious he must have talked to him about his source of income.

Mr. Maguire: That doesn't follow at all, your Honor.

The Court: They have a right to argue that to the jury.

Mr. Koen: That is a matter for argument.

The Court: All right. Do whatever you feel like doing.

Mr. Koen: Maybe I shouldn't say this, but I think

[965] another matter we discussed, sir, was the question of the motion for a bill of particulars and the answer to it and while I still maintain that the particulars should not be introduced in evidence, if Mr. Maguire offers in the first portion of paragraph 1, then it is my thought that the entire document should go in.

The Court: I will do that.

Mr. Maguire: Please note my objection, if your Honor please. The only question we have here pertaining to this is paragraph 1.

The Court: You offer whatever—

Mr. Maguire: I am only going to read it in.

The Court: You read whatever you read and if Mr. Koen picks it up, I will rule on it at the time. I am disposed to admit it and I will save your rights.]

Redirect Examination by Mr. Maguire

Q. Mr. Garrity, did you ever have any conversation with the defendant about his father's estate other than the house? A. No, sir.

Q. Did you have a conversation with anyone else about his father's estate? A. Yes, sir, with Attorney Bianchi.

Mr. Maguire: That's all.

Re-cross-examination by Mr. Koen

X-Q. Did you discuss with representatives of the Bureau of [966] Internal Revenue the matter of Lieutenant Massei's father's estate? A. Yes.

Mr. Koen: That's all.

Mr. Maguire: May I have the bill of particulars, please?

[The Clerk hands Mr. Maguire a document.]

Mr. Maguire: If your Honor please, I desire to read into evidence paragraph 1 of the defendant's motion for

bill of particulars, and the government's answer. You will recall I read it in my opening.

The Court: That's right.

Mr. Koen: Could we have the Court's order written into the record, too?

The Court: Yes. I think I read it into the record, but you may read it, Mr. Maguire.

Mr. Maguire: Yes I will, if your Honor please. The defendant's motion for a bill of particulars in this case: Now comes the defendant and moves that the Court order the Attorney for the United States to file particulars stating: 1. The source or sources of the defendant's alleged unreported income for each of the calendar years 1946 to 1950 inclusive.

The Court's order on that, Judge McCarthy, June 6, 1955. Motion allowed only as to likely and probable source of income.

[967] The government's answer to the bill of particulars, to that particular paragraph: The likely source of unreported income of the defendant is monies received by the defendant as an individual from many persons engaged in various illegal activities for the performance by the defendant of his official duties as a member of the Worcester Police Department, for the nonperformance by the defendant of his official duties as a member of the Worcester Police Department, and for the performance by the defendant as a member of the Worcester Police Department of services rendered to such persons in connection with such illegal activities.

Mr. Koen: I am content with the reading, sir.

Mr. Maguire: Now, if your Honor please, may I approach you at the bench?

The Court: I am always happy to have you all come. You are welcome at all times. That is the better way to do it.

[Conference at the bench:

Mr. Maguire: If your Honor please, I would like at this time to move to strike all of the testimony in this case relating to the so-called Isber memorandum. It is the testimony of Mr. Isber himself, Mr. Hurst, Mr. Garrity.

I do this on the basis that the evidence is incompetent. All of the statements made by Mr. Garrity at that conference were hypothetical.

[968] Secondly, that you can't prove the agency or authority of Mr. Garrity by extra judicial admissions made by him as the alleged agent. And also I would like to call to your Honor's attention in this regard, just being an attorney for a client does not give you the authority to make admissions binding on the client.

Secondly, the admissions, assuming they are admissions binding on the client, are irrelevant and immaterial.

Thirdly, they are beyond the scope of the bill of particulars.

And finally, if your Honor please, the admissions, as such, have not been corroborated.

I also move, if your Honor please, to strike from the record all testimony relating to any statements made to Mr. Hurst or Mr. Calatrello during the course of the investigation with the exception of the conference in Westerly, and I cite the same grounds that I have cited on the other.

I would, at this time, like to have marked for identification the brief which we submitted to the Court at the time of the voir dire hearing on these cases.

And finally I would like to move to strike from the record the testimony of the witness from the [969] Collector's office of the previous tax payments made by the defendant in this case.

The Court: Well, I will take those requests. Without denying them categorically, it may be understood that I am denying each and every one of them as though it was entered categorically and there was a denial categorically, so that all your rights will be saved.]

Mr. Maguire: Your Honor please, the defendant rests.

Mr. Koen: The government has no rebuttal, sir.

The Court: Both sides have rested—

Mr. Maguire: I again have some motions to file, if your Honor please.

The Court: I understand that the motions that you have to file, Mr. Maguire, are motions that you feel the Court should hear in the absence of the jury; is that right?

Mr. Maguire: I have quite a little to say on them.

The Court: In the absence of the jury?

Mr. Maguire: Yes, please.

The Court: That will take some time, won't it?

Mr. Maguire: Yes, your Honor.

The Court: It is my present intention to submit this case to the jury, and I say this parenthetically so that you will understand, Mr. Foreman and Ladies and Gentlemen, just exactly what I mean. I am not going to limit counsel in their [970] arguments. I never do. I think that an attorney should be allowed to have his day in court representing his client and I think the sovereignty of the United States should have its day in court, without any limitation. I know that wonderful judges disagree with me, but that is my considered judgment, predicated upon a long experience trying cases, and I always feel that the fellow that is in here functioning in conformity with his obligation to his sovereignty knows his case far better than any other person would, and that applies again to counsel for the defendant, and the one representing the sovereignty of the United States, and that means, of course, it will prob-

ably go along until four o'clock, on the assumption that we finish these motions and I brought you back at two o'clock, and I would have to charge the jury and then you are at an hour which is an hour that has left not pleasant memories with me.

I hope counsel won't object to this, because if there is anything you want me to add, Mr. Koen and Mr. Maguire, I will be very happy to do it. The formula by which the worthwhile values of the jury system justifies its existence is a simple formula and that is that everyone should have his day in court. You can't have your day in court unless you have a jury that can sit down free of prejudice and bias, having in mind the protection of society and having in mind the rights of a person who is charged with a violation of a statute that carries with it penal sanctions and having in mind the duties and [971] responsibilities that fall upon all of us to preserve a way of life that means something other than words, figures of speech; protestations of affection for the things in life that mean so much to us mean nothing unless there is a practical demonstration of the truths of those values. That applies to a jury. I never felt that a jury should be compelled to sweat it out in a room and do it under circumstances that make it impossible for people to discuss comfortably and in a friendly way situations with reference to the trial and determination of issues by a jury.

Staying in this building at a late hour is something which I do not tolerate, anyway. I never want a jury to travel along the highway of expediency. I never want a juror to sacrifice his or her right, and I will explain to you what that means later on in simple language. I never want to do anything which would take away from deliberations of a jury the lovely philosophy behind it, and that is that you sit down and consult and settle matters. There are certain yardsticks which I can't go into now because it

would take too long but which I will discuss with you briefly later on.

Obviously another thing to consider is this: I assume that both counsel, in the light of their experience and knowledge, would prefer to argue when I charge? Is that right?

Mr. Maguire: That's right, your Honor.

The Court: Is that right, Mr. Koen?

[972] Mr. Koen: That's right, sir.

The Court: I think it is better to do that because of values that you will appreciate as you listen, and as I explain to you what they mean. So that it is inescapably clear, as much as I would like to do it because I have in mind Thursday is a holiday, but I also have in mind the things that make it worth while to follow a charted course that is in keeping with the things that I have expressed to you when I talked to you in the first place, and which I try to give to a jury not as of today but every day that I sit here.

I think what I had better do is to let you go and then I think that I will convene court tomorrow morning at 9:30 sharp. Will that interfere with your getting in here, any of you? [No response.] Can you be here at 9:30? And that applies to you fine gentlemen, alternates; I am still going to carry you along and of course I hope that the good Lord will give you all the strength of mind and body and freedom of thought and freedom from prejudice to carry on as you would want others to carry on.

I am going to excuse you until then. The only objection I have is I am afraid someone might think of something today, but it isn't in my mind and it isn't in their minds. It is just one of those things that makes sense, so I will excuse you until 9:30 tomorrow morning. My only regret is that I could not personally escort you up to the opening ball game.

[973] That will apply to you, too, Mr. DiMento.

So I think I will let you go until half-past nine tomorrow morning, and then they will argue, if we reach that point, and it's my present intention to do so.

Now, Mr. Maguire, you have some motions, and I haven't seen them, have I, as yet?

Mr. Maguire: That is correct.

The Court: I don't know what they are, but whatever they are, I'll be happy to stay here and dispose of them, and I would have to let you go while I was hearing them, anyway. And if you read anything about these motions in tomorrow morning's paper, that is, if you see them, I am going to ask you to refrain from reading them. After all, as I told you, these newspapers, they are a medium of information, and I am certainly putting no restrictions on them. And I want to congratulate these fine fellows because of the lovely way in which they have handled this case. No one has had a cause for complaint. And so I'll give them all a passing remark in the form of summa cum laude. You may convey that back to your other associates. So why don't you go along now, and, God willing, I'll see you tomorrow morning.

[The jury retires from the court room at 12:15 p.m.]

The Court: Now, let's talk about the motions.

Mr. Maguire: If your Honor please, I would like to renew my motion for judgment of acquittal which I filed at the [974] end of the Government's case. That asks you to direct a verdict on each count of the indictment on the ground there is not sufficient evidence on which the jury can base a conviction, a finding of guilty.

If your Honor please, the main contention of the defendant is that the Government has not proved source or likely source in this case. If I may, I would like to please dwell on what I conceive to be the law.

The Court: This is on your motion for judgment of acquittal?

Mr. Maguire: That is correct.

There are five elements in a net worth case. The Government has the burden of satisfying or introducing evidence sufficient to take it to the jury. The one element with which we are concerned primarily in terms of this motion is the element of source. And what does that mean? There are two ways in which the Government, under the cases, can prove source.

The first method is by showing that the defendant is in an income-producing business. That, if your Honor please, is the Holland case. There, you will recall, the Government introduced evidence that the defendant bought a hotel in 1946. They showed that the receipts for the next three years had decreased somewhere between 70 and 80 per cent, as against what the previous owner had done in business at that same hotel. And they also showed that the number of guests in that hotel [975] had increased during this three-year period.

Now there is a lot of use, and of course the phrase which is important in the Holland case is that the Government has to show "likely source." And, if your Honor please, what is meant by "likely" is that in the Holland case the Government had to show a likely source—that was the hotel business. The Government never traced deposits or receipts from the hotel into the accounts of the defendant. They were simply able to show that the business of the hotel had actually increased during this period, whereas the income that the defendant reported had decreased tremendously.

The same sort of testimony, or the same sort of evidence was introduced in the Johnson case, where they show there that the defendant had a string of gambling houses. There, again, it was likely source, your Honor. They were not

able to prove that the defendant in that case got any money directly from the gambling houses; they weren't able to show a check from the gambling house into his savings account or anything comparable to that; they simply showed he owned a string of gambling houses and that was a likely source from which he could have gotten his increase or bulge in income during the years in question.

Now, in this particular case, if your Honor please, the defendant is not in an income-producing business. He is a police officer, a salaried man. There is a definite ceiling on [976] what he could have earned. And so that brings us, if your Honor please, to the next side of it, the next method of proving source which are used by the Government in these net worth cases, and that is by specific items of unreported income.

I know I have called to your Honor's attention before the Chapman case. In that case, if your Honor please, there were seven meat peddlers brought in by the Government to testify that they actually paid to the defendant, or to his salesmen, who in turn turned it over to the defendant,—they paid to the defendant over-the-ceiling money, black market money. Now there again, if I may, is the question of likely source; the amount of money, if your Honor please, that these seven men testified they paid to the defendant for this black market meat did not nearly total what the Government alleged was actual income of the defendant during the indictment years. So therefore they used the words "likely source."

But always bear in mind, if your Honor please, there is always affirmative evidence in every one of these net worth cases and source—affirmative source—I put it that way—bearing on where the fellow got the money and the years in question—not two years before or two years after, but during the years in question.

The other illustration, I think, is the Skidmore case, which

I have referred to, where people in the bookmaking business testified they paid money to the defendant for protection. Now there again, if your Honor please, the amounts of money [977] which they paid did not approximate the increase which is alleged by the Government to be an increase in the particular years in question, but there was affirmative evidence introduced by the Government to show likely source.

In this particular case, if your Honor please, the Government in its bill of particulars has stated, in effect, that they are going to prove this case by specific items of unreported income. That is exactly what that bill of particulars means, if your Honor please. And that, if your Honor please, they have not done. There has not been one iota of evidence bearing on where this money came from during the years in question. There has been no testimony on that whatsoever, if your Honor please.

What they have done, and the only thing they have done, is they have these alleged admissions by Mr. Garrity talking about the defendant's activities back in prohibition days, and also the defendant's activities back when he was on the Vice Squad—all prior to 1943. There is absolutely nothing, if your Honor please, in this case, by way of evidence bearing on the years in question—absolutely nothing.

The Court: What do you say to the proposition advanced in the Adonis case?

Mr. Maguire: The Adonis case—

The Court: Wait a minute, now. There is no obligation on the part of the Government to show a likely source of income [978] if there is evidence upon which the jury could find a wilful fabrication on the part of the defendant.

Mr. Maguire: The Adonis case, as your Honor has said,—

The Court: Or under circumstances where the defendant would be bound by it.

Mr. Maguire: Now in the Adonis case, if your Honor please,—

The Court: You don't like the Adonis case, do you?

Mr. Maguire: I think it's bad law, if your Honor please. And I'll go further and argue—

The Court: You don't like it. But the Adonis case is the one case that came down after the decisions of the Supreme Court. Isn't that right?

Mr. Maguire: If you please—

The Court: Isn't that right? All those other cases were before.

Mr. Maguire: No, I think there are others, if your Honor please.

The Court: What?

Mr. Maguire: I think there are others since then.

The Court: No, there's the Ford case, Ford v. United States. But I mean the other cases that you cite?

Mr. Maguire: The cases I cited plus the Holland case itself is the leading case.

The Court: That's right. But I mean the cases that you cited.

[979] Mr. Maguire: They were prior to the Holland decision.

The Court: That's right.

Mr. Maguire: Now let me talk about the Adonis case, if your Honor please. In that case there was one year involved, the year 1948; and the Government introduced evidence that the defendant at a judicial hearing in Holland in the year 1951, he was asked specifically about the, I think it was, $40,000 increase in the 1948 year. He was asked specifically where that came from. He then listed, I believe four or five different places where he got this $40,000. Then the Government went to work at the trial in the tax evasion case and introduced what he had stated in the Holland proceeding. This is the defendant himself,

your Honor. Then they introduced the Holland proceeding. Then they went ahead and in effect proved conclusively that as to each one of the four or five different sources to make up this $40,000 that the defendant had lied.

Now they say that a deliberate fabrication is sufficient.

The Court: That is, deliberate, a wilful fabrication. All that means—

Mr. Maguire: "Calculated fabrication", I think is the actual words used in the decision. If your Honor please, I say to you the facts of that case are completely different from—

The Court: The facts of no case are the same as the others, Mr. Maguire.

[980] Mr. Maguire: I understand, if your Honor please. But I say to you that that clearly does not apply to the case at bar.

I might point out before we leave the Adonis case there is one interesting point, I think. There was testimony introduced at the trial, if your Honor please, that the defendant in 1950—bear in mind that the year of the indictment was 1948—

The Court: That is right.

Mr. Maguire: They pointed out for the year 1950 the defendant admitted that he represented some pinball operators in legislative work down in New Jersey, and the Government introduced that as showing that that was source. If he was doing it in 1950 he was probably doing it in 1948. The Court of Appeals said that has no bearing on the matter; it applies to 1950, whereas the year under indictment is 1948; so that the case has got to stand on this calculated fabrication or not at all.

I think, if your Honor please, that that portion of it is the complete answer to the Government. Let us assume that these admissions are admissions. Let us assume they are. Let's take the admissions, alleged admissions about

prohibition days. Let us assume that they are binding on the defendant,—which your Honor, I strongly urge they are not and were never meant to be admissions; but let us assume that they are, for the [981] minute. What does that have to do with the years under indictment, 1946 through 1950?

In other words, you take the Adonis case where you have a situation where the defendant himself made admissions two years later and the Court of Appeals said you can't consider that as evidence of source.

How could you possibly, if your Honor please, take the defendant's activities back in prohibition days, or his activities when he was on the Vice Squad, as having any bearing on the years in question, which are the years '46 through '50?

The Court: Suppose there is evidence here from which the jury could find—I am not saying they should, Mr. Maguire. Now, don't misunderstand me. Suppose there is evidence from which the jury could find that he received this money, these sums of money totaling $149,000, or somewheres around there, from sources that were entirely outside his income as a police officer; suppose that as a likely source, that being so, he still remained in the Police Department during the period set out by the Government, retiring, as I remember it, Mr. Maguire, in 1950. Am I correct in that?

Mr. Maguire: That is correct, your Honor.

The Court: What do you say about that?

Mr. Maguire: Well, if your Honor please,—

The Court: If he got money, if the jury found he got money in an improper manner, graft and—I think the words were [982] "graft" and "gifts" at various railways when he was getting an income as a police officer, a salary of $3,000 a year, and if he still continued on the Police Department, isn't that a likely source? Haven't

the Government a right to argue that is a likely source?

Mr. Maguire: I am sure that's what they are going to argue.

The Court: That's only one.

Mr. Maguire: I say to you, if your Honor please, I am completely satisfied they couldn't be more wrong and that you would be in error if you allowed them to. Just like the Adonis case the Court of Appeals didn't allow the evidence to be argued back from 1950 to 1948.

The Court: Yes, they did for this reason, because they said the nature of the proceedings was not identified but only because the appellant took the position that this information might prejudice his case in the view of the jury. They didn't know what it was.

Mr. Maguire: No, I am not talking about the Holland proceeding.

The Court: I mean the proceeding in Holland, they didn't know what it was.

Mr. Maguire: No, I am talking, if your Honor please, about the admission of Adonis in 1950 that he represented pinball operators before the Legislature, he did some lobbying. [983] The Court of Appeals said you cannot argue from that, that that was the source of his income in 1948.

The Court: But he did, he stated the money for the land, the purchase, was supplied by his mother as a contribution.

Mr. Maguire: That, if your Honor please, is an argument on a different point.

The Court: Then the Government showed that the mother was a widowed woman, she died at the age of 79, about a month before the appellant began negotiations for the purchase of the homestead, that for several years this elderly lady had lived first with a son, other than the appellant, and at the time of her death with a daughter, and it was shown that in her advanced age she was supported by

a child with whom she lived and made no contribution to household expenses.

Mr. Maguire: If your Honor please, all that bears on proving that what Adonis testified about income was a calculated fabrication. What I am trying to point out, if your Honor please, is that, in 1950, Adonis admitted to a Government witness that he represented pinball operators. The Government says you cannot argue from that, that that was the source of his income two years earlier in 1948. That bears, I think, directly on the question as to whether you are going to allow the Government to argue in this case that because of these alleged admissions, what happened back in prohibition days, that is a likely source of income in this case. I think that Adonis case on that point— [984] not on this fabrication, but on that particular point, your Honor—is dead in point.

There is one other aspect of this, if your Honor please, where I think from our discussions with Government attorneys we part company. It is the defendant's position, if your Honor please, that the Government has to introduce affirmative evidence of likely source, and by affirmative evidence that means they have got to have witnesses up here on the stand during the years in question telling about payments or whatever else they can find in the years in question, if your Honor please.

The Government, I believe, takes the position they do not have to do that; that all they have to do, in effect, is to negate the fact that he didn't get an inheritance or he didn't get a gift during that period.

[985] . I say to you, if your Honor please, that is not the law and I don't think the cases bear that out, the Holland case particularly. If there is affirmative evidence introduced of a likely source, then, in addition, if your Honor please, the government has got to reasonably negate other nontaxable sources of income such as loans, inheritances

and so forth, but it is a twofold burden on the government, as far as this is concerned. They have stated in their bill of particulars they were going to introduce specific items of unreported income. That they have not done. They have made an effort to negate certain nontaxable sources, if your Honor please, but that they completely failed in sustaining their burden of proof of any likely source during these five years involved, and I say to your Honor as earnestly as I can that it would be error to allow the government to argue that from the defendant's activities in prohibition days or prior to 1943, that that is evidence for the jury to find source in the years in question.

The Court: One of the situations before me is this: As the Supreme Court very well said in one of the opinions written by one of the dearest friends that I have—after all, I had a very dear friendship with him. He said:

> "Trial courts should approach such cases in the full realization that the taxpayer may be ensnared in a system which, though difficult for the prosecution to utilize, is equally hard for the defendant to refute."

[986] Then they go along, and it states the difficulties that surround the government in their efforts to adopt a fair yardstick, and this jury could well find on the evidence —I am not saying they would—that from the time that Mr. Garrity became counsel for this defendant at least to the time of the conference at that bank in Westerly, his client never spoke, except once. From that time on Mr. Garrity was the spokesman for his client.

The problem before me is whether or not a person who is charged with wilful tax evasion can hide in a dark corridor, close the door so that the government can't do anything about it except to go into communities and talk to racket fellows.

All right, Mr. Koen: go ahead.

Mr. Koen: Mr. Di Mento.

Mr. Di Mento: Would someone help me take the board over here?

[The blackboard is moved.]

The Court: Let me read from that Holland case, Mr. Maguire.

"Among the defenses asserted is the taxpayer's claim that the net worth increase shown by the Government's statement is in reality not an increase at all because of the existence of substantial cash on hand at the starting point. This favorite defense asserts that the cache is made up of many years' [987] savings which for various reasons were hidden and not expended until the prosecution period. Obviously, the Government has great difficulty in refuting such a contention. However, taxpayers too encounter many obstacles in convincing the jury of the existence of such hoards. This is particularly so when the emergence of the hidden savings also uncovers a fraud on the taxpayer's creditors."

Of course one of whom naturally is the United States Government. That is another paragraph on that decision and that is a paragraph which is symbolic of many of the decisions that run through these other cases.

Mr. Di Mento: If your Honor please, I am going to confine myself to the question of so-called source, as Mr. Maguire did, and I have asked that the board be brought here so we get a better picture of the problem.

As your Honor knows, you do not get to the question of source until after you have passed the question as to whether there have been net worth increases and current receipts during the indictment years. So therefore, for the purposes of talking about source, I shall assume that the defendant received $29,000-odd in 1946, $11,000 in 1947, $7,900 in 1948, $12,000 in 1949 and some $38,000 in 1950.

The question then arises as to whether those receipts

received during those years derived from a taxable or derived [988] from a nontaxable source. That is, we assume he got money during those years. Now, did he get it as business income or did he get it as gifts, inheritances, loans, or some other nontaxable way?

There are two ways, we say, that the government can show that these receipts, these current receipts, are taxable receipts. In the first place, we can show a likely source. Now, we think that we have done that here. What we have done is to show, through the defendant's own admissions, a history of 20 years of graft taking followed by, in 1945, while the defendant is still on the police force and as a matter of fact when he gets a promotion to lieutenant in 1947, followed by the continued receipts of income.

That distinguishes the case, we think, from the Adonis case where the government had evidence of a business two years after the indictment year 1948. Here we are not showing you the receipt of illegal income in 1943 or 1942 or 1941; we are showing you the receipt of illegal income for 20 years prior to the indictment years.

Now, there is, as I said, another way we think we can show that these receipts—once again I wish to emphasize we are assuming that those receipts were received during the indictment years. Another way that we can show that those receipts were taxable receipts is by negating the possibility of nontaxable receipts. It is perfectly clear, we think, that if a [989] man receives $29,000 in 1946 and received no taxable income, no nontaxable income, during that year, that the $29,000 he received must be taxable income.

I wish to call to your Honor's attention the testimony that this defendant, through his attorney, chose to make explanations to the agent as to where the money came from. He didn't have to do that but he chose to do it, and those explanations revolve mainly about one claim,

and that is that the money was accumulated prior to 1946. So that when the defendant states categorically that the money was accumulated before that date, he is stating, one, that he received no current nontaxable income and he is further stating, two, that he received no current taxable income. Now, one of those statements is a statement against interest and one is a self-serving statement. The statement against interest is that he received no current nontaxable income. The self-serving statement is that he received no taxable income.

We say that the jury is entitled to reject the self-serving aspect of this statement and to accept this statement against interest, namely that he had no nontaxable income during those indictment years. So that if the jury does accept that statement that he had no nontaxable income and the jury finds that there were increases in net worth, there can be only one logical conclusion, that the increase is derived from taxable income.

[990] When I offer to your Honor the testimony that the defendant claimed that he had the money prior to 1946, I do that without regard to the truth or falsity of that statement. I am simply treating that statement as a combination of admissions and I am selecting out of that combination of admissions a statement against interest which the jury may accept.

However, we have something more closely related to the Adonis case here; we have testimony from Mr. Isber that the defendant, through his attorney, stated that he had received X dollars in February of 1949. I think that that statement made by the defendant through his attorney was clearly intended to convey to the Bureau of Internal Revenue the thought that the money received from the defendant's father's estate materially contributed to his increase in net worth during the years 1949 and 1950 and I think that if the jury rejects that or accepts the state-

ment as having been made, but decides that it was a false statement, that the jury can then infer that the statement to the Bureau was an attempt to conceal taxable income. Now that, of course—

The Court: May I ask, did Mr. Hurst corroborate Mr. Isber?

Mr. Di Mento: On the X dollars?

The Court: Yes.

Mr. Di Mento: I believe he did, but the transcript is the best evidence of that.

[991] Mr. Maguire: I am sure he did, if your Honor please. He said he didn't recall—no amount was mentioned.

The Court: He said he got some money and half interest in a tavern which his father ran and he and his brother were the only beneficiaries. His brother testified he never got a cent out of it and all he got was a half interest in a three-tenement house, and Mr. Bianchi testified he drew the will and filed it and there was no inventory ever filed and he never heard anything about it afterwards.

Mr. Di Mento: There is one other thing I would like to add. In one of the letters which Mr. Garrity wrote to the Bureau in answer to the question whether Mrs. Massei ever received any gifts or inheritances, Mr. Garrity states No. I will read it to you.

> "Has Mrs. Massei inherited or received as a gift any money or other values? Answer: No, not at any time."

That is in the letter of November 19, 1951.

In closing I would just like to emphasize what I said at the beginning, perhaps in different words. Source is entirely distinct from evidence of increases in net worth. The government does not have to show source as part of the proof that net worth increases existed. You do not get to the question of source until you do have proof of net worth increases and, once you have the proof of net worth

increases, the [992] remaining question is a very simple one and that is whether those increases are derived from taxable income or nontaxable income.

Just to look at this board and just to know that the person who owns these assets is a police officer would certainly convince even the most casual observer that no one gave him $29,000 in gifts or he didn't inherit that much money in 1946 and he doesn't inherit money every year. He doesn't get gifts of that size every year. We have a man who, by his own admissions, has lived frugally. There is no evidence, and the agents were not able to find any evidence, that he comes from a family of wealth so that if these increases, $29,000, $11,000, $7,000, $12,000, $38,000, if that obviously strikes the casual observer as not being gifts or inheritances or other nontaxable receipts, they must be taxable receipts.

The Court: The government is going to argue there was an increase from $12,000 in 1949 to $50,000—what is that figure?

Mr. Di Mento: There is an increase, your Honor, in total net worth from $113,000 to $149,000. That is the net worth increase. But when I speak about source, I assume that the jury has already passed the question of whether there was an increase.

Mr. Maguire: If your Honor please, just a word or two on Mr. Di Mento's argument. He takes an increase in any given [993] year—let's take the first year. He takes that increase and he says you have to make the assumption that it was received in that year. Obviously that is fallacious, if your Honor please. It doesn't follow at all he received that money that year. As a matter of fact, it is the defendant's contention he had it before that time.

The Court: This is a case typical of the ordinary case tried on the theory of circumstantial evidence.

Mr. Maguire: That is exactly what it is.

The Court: All right. If you have an increase from one hundred—I will go to the last two years. You go to that one.

Mr. Maguire: Fine. The increase here is $36,000, your Honor.

The Court: $36,000 for one year, and he is a police lieutenant.

Mr. Maguire: Now, wait a minute; excuse me, your Honor. It does not follow from the fact of an increase that that is income. Your Honor, if I can repeat that a thousand times—

The Court: But all the government has to do, as counsel for the government has argued, is to negate—

Mr. Maguire: No, if your Honor please. That again, I insist, if your Honor—

The Court: I am going to send this case to the jury.

[994] Mr. Maguire: I trust my rights have been saved.

The Court: I will reserve on your motion, as I have a right to do under the rules.

[995] The Court: I think I will deny the motion for judgment of acquittal and reserve your rights. I have a right to reserve or not. I think I will deny it, so there will be no misunderstanding, and I am going to submit the case to the jury, what I consider to be proper discretion, and I have indicated to counsel what I consider the law to be. I don't want to have any confusion on the law. I want counsel to argue the facts in keeping with what I consider to be legal principles.

Mr. Maguire: If your Honor please, I'm filing our requests for instructions [handing].

Mr. Koen: There is one more matter, may it please the Court, which we left in abeyance a day or two ago and that was with reference to blackboard markings covering the net worth and covering the tax structure. We

left it, I think, at your suggestion that I was to make photostatic copies of the figures which appear on the board; I would offer those for the purpose of going to the jury, and I have, I think, those available now,—at least I have the tax computation here. I know there is a photostatic copy of the net worth computation but I can't find it in my papers now. I probably left it down on my desk. We were wondering what your Honor wishes to do about that. If your Honor has any doubt about it, why, I'll withdraw it.

The Court: There is a statement in the Holland decision by Justice Clark in connection with that, and I am trying to find it. You probably know where it is, what page [996] it is.

Mr. Maguire: Page 5, your Honor, about two-thirds of the way down.

The Court [after perusing]: I want to call your attention this:

> "As we have said, the method requires assumptions, among which is the equation of unexplained increases in net worth with unreported taxable income. Obviously such an assumption has many weaknesses. It may be that gifts, inheritances, loans and the like account for the newly acquired wealth. There is great danger that the jury may assume that once the Government has established the figures in its net worth computations the crime of tax evasion automatically follows. The possibility of this increases where the jury, without guarding instructions, is allowed to take into the jury room the various charts summarizing the computations; bard figures have a way of acquiring an existence of their own, independent of the evidence which gave rise to them."

Now that last phrase is a phrase which I think I could translate. I think I could tell about its origin. But the fact is, one of the important things, that is, the starting point

is the basis on which the Government predicates their claim. If [997] that starting point falls down, then your house of cards falls down. Isn't that right, Mr. Koen? That is correct.

Mr. Koen: The starting point has never been disputed. The authenticity—

The Court: That's right, the authenticity of those figures has never been disputed. There is the net worth which fixes the income at the beginning of 1946 at X dollars, $60,000.

Mr. Maguire: Am I correct as to Mr. Koen's statement, that he says the starting point has never been disputed? The figures as they appear on the blackboard have never been disputed, but we had this money prior to that.

The Court: Yes, you had this money prior to that, I know; but the figures have never been disputed, have they? So the figures haven't been disputed, what harm will it do if those figures go to the jury? They will be before them, because it's a net worth case.

Mr. Koen: With appropriate instructions, sir.

The Court: I'll give appropriate instructions. I'm disposed to do either one of two things: to send them up or have photostatic copies go in. This is the evidence.

Mr. Maguire: Well, the defendant objects, your Honor.

The Court: It is only a chart, and these are copies. What they would have to do, of course, is to find the basic facts first, they have got to find the evidence that is recited on that board as a basis on which to predicate a starting point, Mr. Maguire. As I remember the testimony, the witness—what [998] was his name? The lawyer, the C.P.A.?

Mr. Koen: Mr. Hurst.

The Court: Mr. Hurst testified that substantially all the information in connection with that came from Mr. Garrity.

Mr. Maguire: Basically, the data, your Honor, as Justice Clark pointed out, is the very fact that a jury sees these increases and it can't help but prejudice them.

The Court: They say it should be done under proper instructions, and I'll give proper instructions how that is to be admitted. These are photostatic copies, and I don't know why a chart can't be sent up to the jury room just as well as evidence. I don't know why it can't.

Mr. Koen: I think they can take these with appropriate instructions.

The Court: That's right.

Mr. Koen: That is all—instructions to guard against the dangers.

The Court: Guard against the dangers from figures in the hands of the jury.

Mr. Maguire: If I have ever seen a suggestion in a Supreme Court decision in effect advising trial justices not to allow that to go in—

The Court: No, it doesn't say that. If I have ever seen a—

Mr. Maguire: It says you can do it, may it please [999] your Honor, but it really puts a red flag up.

The Court: If I have ever seen a suggestion—"bare figures have a way of acquiring an existence of their own, independent of the evidence which gave rise to them"—if ever I saw a phrase that was logically out of step with what you say, that's the phrase. That's just simply an expression of opinion, and it is a part of Mr. Justice Clark's opinion but it represents probably confirmation of the ideas of other Justices, and I'm not finding any fault with it, but I don't know what it means. Neither does anybody else know what it means. "Bare figures have a way of acquiring an existence of their own." Well, of course they do. Figures always have a way of acquiring an existence of their own. I have a bank balance of $5500.

There it is. It has a way of acquiring existence. And then it says "independent of the evidence which gave rise to them." Well, under proper instructions, Mr. Maguire, I can take care of that. That is what it says. If I did it without giving proper instructions as to it, I would be guilty of reversible error.

I'm disposed to let that go at the present time, and I'm disposed to do it under proper instructions which I'll give tomorrow.

Mr. Maguire: May I note my objection, your Honor?

The Court: Well, I think you can take your exception if I do that, at the time.

Mr. Koen: May I present these two documents, sir, [1000] one of which is a photostatic copy of the original tax computation which conforms in every respect with the recitation on the board; and also the annual statement of net worth, which conforms in every respect with the figures which appear on the board.

Mr. Maguire: Do you have a copy for us, Mr. Koen?

The Court: Have you seen it, Mr. Maguire?

Mr. Maguire: No, I haven't.

The Court: Is this a copy? Would you look it over so you can agree that it is?

Mr. Maguire: I have a copy. Fine. I'll study it. I'm sure if Mr. Koen says it is accurate, it is.

The Court: It's a copy. What do you want to have done with that? Mr. Koen, what do you want to have done with it?

Mr. Koen: I think we have an understanding that you will decide later on whether they should go or the chalk on the board.

The Court: You don't intend to have one to go to the jury, each one of them to each jury; just that?

Mr. Koen: No, no, just the photostatic copies which we have made. One copy of each document for the entire jury.

The Court: That's right. I would like to have you agree that is a rehash. It seems to me it is far better than carrying this great big board up. It's less dangerous to your client.

Mr. Maguire: I objected to the board's going in [1001] initially, and I think you agreed.

The Court: No, I didn't. I said I didn't know what I would do. I didn't know, I didn't agree. I said I would decide what I was going to do, and I made some comments about that paragraph that I have just read here. That's just like saying that words are not expressive of a person's thoughts. Well, if words are not expressive of a person's thoughts, then I don't know what is. I'm not quoting anybody. Anyone that feels that the cap fits them can wear it.

I think it is within the orbit of a judge's discretion to allow photographs. Suppose someone has received terrible injuries, and you know there are photographs that show the condition of the limb that is removed. It is within the orbit of a judge's discretion to keep that out.

Now suppose counsel desires to show it to a jury. I don't think I would ever allow it because of the grewsome effect of it, but I would allow the photograph.

Suppose, for example, you have a prosthesis, an arm off, or a leg off. Some of the judges feel that a jury shouldn't be allowed to handle it, and probably they're right, Mr. Maguire, but I think they should be. I don't see anything wrong about it. There are a lot of things within the orbit of a Court's discretion. But I agree with you that a Judge is guilty of an abuse of discretion who frankly closes his eyes to a danger zone—do you follow me—which might engulf his client in a [1002] situation where he would lose his life, figuratively speaking. I want to protect all those rights, I want to protect all those liberties that men have, and that's my purpose. I am sure

you'll find when I finish charging there will be no animus on my part in this case or any other.

Mr. Maguire: 9:30, your Honor?

The Court: 9:30.

[Adjourned, at 1:10 p.m., to 9:30 a.m., Wednesday, April 18, 1956.]

[1003] TWELFTH DAY

Court Room No. 5,
Federal Building, Boston.
April 18, 1956.

[Conference at the bench:

The Court: I have determined, in the orbit of my discretion, in the light of what I consider to be the necessities, that these figures which were put on this board under the mandate of a federal procedure that has been recognized as a basis upon which the government predicates, in part, the claim of a tax evasion because it is the starting point—obviously if those figures are wrong they might well have a fatal effect upon the government's claim because the government's claim is that they have satisfied the test that it is a condition precedent to figures such as we have on this board—I am satisfied that these figures are figures that are singular. They are the same as figures that are put in, except that it is a criminal case, in connection with the trial in a civil court where there is a life expectancy worked out on earning capacity by an expert, the weight of it being for the jury. I have always said that to a jury. I am going to send this to the jury. I will have the boards taken upstairs. I think it is the fair thing [1004] and the best thing to do under the proper instructions. I will instruct the jury very solemnly on it.

As they look at these figures and they see them and they weigh them, they can weigh the value of the government's claim, with the obligation on the part of the government to prove the defendant guilty beyond a reasonable doubt, and they can weigh the value of the government's claim. This is, after all, a case that is predicated upon circumstantial evidence. There isn't any mystery about circumstantial evidence. As you read these cases, you would feel that someone put his hands into a grab bag and came up with a new principle. It is a principle that is associated with the growth and development of our criminal jurisprudence; it goes away back. I can remember the famous Tucker case, which was predicated to a great extent upon circumstantial evidence.

Mr. Koen: I intended to use the Tucker case in my argument. In view of your statement I will leave it alone.

The Court: I am going to say to this jury this case has been tried on a very high plane and that counsel are to be commended. I think I can take a bow myself because I have kept prejudice out of the case.

Mr. Koen: I think both counsel agree to that.

[1005] The Court: The fact is, gentlemen, in the light of my experience, and my experience isn't a yardstick at all; it is what the fundamental principles are—here is a fundamental principle that circumstances, whether they used the phrase or not, whether someone might apply it to one particular statute or some other statute, circumstances which exclude every reasonable hypothesis except that which is reconcilable with the defendant's guilt, are a basis upon which the jury could predicate a verdict of guilty. Circumstances which leave it in a balance are circumstances

which necessitate a verdict of not guilty. As the Court said in the Holland case, or one of these cases, it is another way of describing the doctrine of reasonable doubt. The principle of reasonable doubt is a principle that is founded on a valid right. It is a right that is established. Whether it was in the Constitution or not, it is a right that has a solid background. It should be safeguarded. That is of prime consideration when we sit in judgment of others. It is a salutary right which in my judgment should be extended to matters which affect the judgment of all us because if we use that, we will be able to say, I have formed a judgment and I haven't done unreasonable harm. [1006] So that in many ways circumstantial evidence may involve circumstances more probable than the affirmation of a witness.

Mr. Maguire: An eye witness, your Honor?

The Court: Oh, certainly, because eye witnesses can lie, but circumstances correlated to other circumstances furnish the inescapable mark as near as you can get it. Truth is relative. You can never get it, Mr. Maguire, from any set of facts. There is always some little doubt. That will be so as long as we live, no matter what you do. The doctor that makes a diagnosis and sits in consultation with two or three other doctors—

Mr. Maguire: I suggest that is guesswork.

The Court: No, it isn't. He finds a fellow isn't suffering from something and the next day he dies from it. It deals with human probabilities. For example, you can't erase the footprints that are pressed upon, for example, snow which lead into the back door of a house, which fit the shoes of some one person. You can't escape finger prints. No two finger prints are alike. That's a circumstance. That's circumstantial

evidence, direct evidence. You can't only convict in these cases by direct evidence, otherwise all a fellow would have to do would be to hide himself in a dark corridor and escape trial. I'm not talking about your man at all. Don't misunderstand me. I am just talking about this principle.

Therefore I have determined, unless the Government objects to it, this little copy—you objected to the photostatic [1007] copy going in yesterday.

Mr. Maguire: I objected to the board.

The Court: That's right. I am going to send some one of them up. If you object to that, I'm not so sure —I think if you hadn't accepted that the Government would have been satisfied, but you objected to both, and I'm not going to have this jury running down every time they want to see a figure. They are entitled to see these figures. It is evidence, isn't it?

Mr. Koen: You're going to have a physical problem getting the board upstairs.

The Court: We won't have any because I had them brought up before. I'm going to charge them properly.

Now I want to talk to you about something else. Could I have that slip of paper, that excerpt that we worked out yesterday? [Handed.]

Now I wanted to have both of you cognizant of this because one of the reasons I brought the jury in at half-past nine, because I figured we would have some things to talk about. I'm going to say to the jury, in substance, something like this. If you believe that admissions were made by the defendant's attorney with authority to make admissions, you must find that the admissions are corroborated before you weigh the admissions against the defendant.

Mr. Maguire: I didn't hear you, sir.

The Court: If you believe that admissions were made [1008] by the defendant's attorney with authority to make admissions,—I have already prepared, I am going to cover the other situation, that of authority, more carefully—you must find that the admissions were corroborated before you can weigh the admissions against the defendant.

What is corroboration? You're going to argue what corroboration is. You require a simple amount of corroboration.

Mr. Maguire: It doesn't take much, your Honor.

The Court: A confession is never sufficient, but the slightest amount of corroboration is enough.

Mr. Maguire: That is right.

The Court: It is some independent evidence which will sustain or support the admissions, something which tends to bear them out, something which causes your belief that the admissions were relevant. I don't want to point them out because if I were to do that I would be pointing them out to the United States Attorney, what he ought to do with them, and I am not going to do that, and I am not going to point out what you should do because I think you know what you ought to do.

Now this is what I am going to charge on. I want you to know this. I am going to charge that there is another alternative which might be presented by the evidence. If the jury should find that the admissions were not made, or finding they were made, they were made without the authority of the client to speak, or the attorney to speak for his client.

[1009] Then the case would stand in this light. If they found the net worth was correct, they found the increases that are set out on the board weren't correct, then they are left with the question of source.

I have to charge the jury that there is no direct evidence of source except this statement made by Mr. Garrity to the Internal Revenue agents that the defendant received a large amount of cash from his father or his father's estate. I think his death was in '48 or '49, was it?

Mr. Koen: '49, sir.

The Court: '49. If they believe this assertion as a source by the defendant, then I am going to charge the jury as to the years 1949 and 1950 if the Government has not excluded the possibility, the probability that the defendant received the money from a non-taxable source, then a verdict of not guilty is to be returned, but if they believe these assertions by the defendant through his attorney as to the source, then I am going to charge the jury as to the years 1949 and 1950 they may infer that the monies were collected, they may infer that the Government's evidence on the net worth theory came from a taxable source, and I am going to do that in conformity with the philosophy laid down in the Adonis case.

Mr. Koen: May I interrupt you just a second? I think you said a large amount of cash. I think the evidence is an unnamed amount.

The Court: Unnamed amount; all right, unnamed amount [1010] of cash.

Mr. Maguire: If your Honor please,—

The Court: Wait a minute. I don't care whether I am wrong or not. Then, in addition to that let me say this to you. I don't mean to say I don't care whether I am wrong. I have given this case my considered judgment, this situation here where a lawyer who is a brother-in-law of the defendant, and the evidence shows that he filed a petition for the allowance of the will some time in 1949 or 1950. I don't know

whether he was named as executor or not. Was he named, as the evidence has gone in?

Mr. Koen: You mean Mr. Bianchi?

The Court: Yes.

Mr. Koen: Yes.

The Court: He was named as executor?

Mr. Koen: Yes.

The Court: He drew the will and was named as executor. But apparently from that time down to the present there has never been filed an inventory.

Now the statutes of Massachusetts—wait a minute now. They don't compel him to do it but they do exact, under the terms of the bond, that he file an inventory within three months or six months,—I forget which. It's right in the Massachusetts statute. There is no doubt about that.

Mr. Maguire: If your Honor please,—

[1011] The Court: Wait a minute, wait a minute.

Mr. Maguire: Are you going to talk to the jury about that?

The Court: I don't know what I am going to say to the jury. I will try to keep away from it. I tell you what I am going to do. If the jury finds that that statement that money came from that estate; if the jury should find that the explanation for this large increase— Am I correct in that?

Mr. Maguire: No, your Honor, there is no tying it up.

Mr. DiMento: An explanation was the cash was accumulated prior to 1946.

The Court: Well, that's for them.

Mr. Maguire: That is an explanation.

The Court: Yes, that is an explanation. On the other hand, the Government has a right to argue that

he was in the same position to get money from those sources as he was before.

Mr. Maguire: I shall object to that strenuously.

The Court: All right, you have a right to object. You are within your rights to do that. That is the usual position of every lawyer, and I'm going to send it to the jury.

Now I am going to tell this jury in substance that no likely source need be shown if there has been a wilful fabrication. There is evidence here, and I assume the Government is going to argue it—I don't know whether they are or not— [1012] there is evidence here from the brother that he never got any money out of this estate; that all he got was a half-interest in a three-tenement house. That is the evidence we have before us.

Mr. Maguire: What is the fabrication involved?

The Court: The fabrication is he got a large sum of money.

Mr. Maguire: No, it isn't large. He got an undetermined sum.

The Court: Certainly. But the brother said there wasn't any money, he testified he never saw any money as executor.

[1013] The Court: He testified to that under oath, that he never had any assets come into his estate. He gave that as a reason for not filing. If that is a fabrication, you don't have to show it. The weight of it is still for the jury.

Another thing that bothers me is this, gentlemen: It is inescapably clear under several decisions—I am thinking, for example, of the McCormack case, and that is a case where the fellow was charged with tax evasion and I think it was a net worth case. You probably remember it, don't you? McCormack v.

United States. Those cases have decided that the fact that a man says what he gets as a gift doesn't carry with it the implication it isn't income because gifts have no relationship, and if people are coming in and giving money to a stranger, then it is properly considered income.

Mr. Di Mento: I submit the jury should be instructed that graft is taxable income.

The Court: I expect you to have that. Have you got that set out? You better have it set out.

Mr. Di Mento: I don't have numbered paragraphs. I had a long request.

The Court: I am prepared to say that gifts could be. I think if you read McCormack v. United States you [1014] will find that is so. Otherwise the weight of it, as far as I can see, is for the jury.

Mr. Maguire: This is a statement about prohibition days, your Honor.

The Court: The principle doesn't vary any. This net worth theory has never changed any. It started away back in the Capone case. How would it be possible to catch up with fellows who hid in dark corridors? Let's not talk about the fellow that is charged with income tax evasion; let's talk about no tax case at all, but let's talk about the fellow that holds up a bank, who is a gangster and commits crimes of violence, and he hides things away. He says, "I got this as a gift from Joe Doakes." The jury have a right to believe whether he got it from Joe Doakes or somebody else, haven't they? They don't have to accept his explanation. That is why I take the position all the government has to do is negate a—

Mr. Maguire: Your Honor please, again please note I save my exceptions.

The Court: I am going to say that; I am going to give you a fair charge.

Mr. Maguire: I gather from the way you have been talking, from my point of view—

The Court: You would want me to direct a verdict, [1015] and I am not going to do it. I think you ought to recognize the fact that, and I think you should fundamentally—you should recognize the principle of humility and realize a judge has to rule on questions of law and when a judge disagrees with you, he does it in conformity with his obligation to his sovereignty, but by the same token you have a right to see to it that he will refrain from showing any prejudice or bias, that he will set it up correctly and without bias, and I am going to do that. When I finish I will ask you if there is anything that suggests prejudice or anything else, and if it does I am going to correct it and clear the situation. That is the way the government would prefer to have it; isn't that right?

Mr. Koen: Yes, sir.

The Court: If I allowed counsel for the defendant to settle the question of guilt or innocence of everybody—suppose, for example, Judge Hurley allowed the attorneys for the Brink's fellows to settle the question of guilt on the fact that there was a concerted effort of everyone except the Catholic Diocese of Boston, and the Jewish and Protestant churches, to throw those fellows into jail and the judge says that that was so, what kind of justice [1016] would you have?

Mr. Di Mento: Your Honor, are you going to give the charge requested, starting at the top of page 8?

Mr. Maguire: We have got a flock, the same as you have.

The Court: You can ask me about any that you want now. I will be happy to have you point out to me any charge that you have requested so that if I am not giving it you won't waste your time.

[Examining.] I think I am going to cover this pretty well. If I don't cover matters, Mr. Maguire, you feel are fundamental to your client's rights, you just call it to my attention. I have approached these with a lot of humility. I am going to do my best to satisfy everyone within the four corners and I will do the same with the government.

Mr. Di Mento: Are you going to charge there are five elements to this crime?

The Court: No.

Mr. Koen: Just one more thing. The other day Mr. Maguire and I were discussing this, and we were discussing it in the corridor this morning. You indicated to us if we reached the point of arguing to the jury, when we did, you did not wish us to discuss the law. You wanted that left to you. Am I right?

[1017] Mr. Maguire: I don't understand that at all, Mr. Koen.

The Court: I am not going to let you say there is no principle of law applicable in this case.

Mr. Koen: Then I think, your Honor, you further said you didn't wish counsel for the government to interrupt the defendant's argument and, in return, you suggested that the counsel for the defendant not interrupt the government's argument.

The Court: That's right.

Mr. Koen: That you would take care of any objectionable situation so far as the treatment of the law was concerned.

The Court: Is that satisfactory to you?

Mr. Maguire: That's fine.

The Court: I will make that, provided you gentlemen are satisfied.

Mr. Maguire: Understand, of course, after Mr. Koen finishes or I finish, he can come up and object for the record to anything I said, and vice versa.

Mr. Koen: My objection is of no moment because I have no appeal.

The Court: Yes, you have—

Mr. Koen: What can I predicate an appeal on—

The Court: The objection of the United States [1018] Government will be recognized by me and I will give it the same full force and effect as I would give Mr. Maguire. I know that the defendant has a right of appeal. I always advocated the right of appeal on the part of the government when I was United States Attorney. I think it is the fair thing to have. It is the one thing that would protect everybody. There is, after all, a couple by the name of Mr. and Mrs. America that you have to think of all the time, every hour and every day of the week.

Suppose we bring the jury down now.]

[The jury arrive.]

The Court: Now, Mr. Foreman and Ladies and Gentlemen of the Jury, some evidential questions have come up and we have been discussing these questions for the last 45 minutes and they were questions that had to be settled and I anticipated the possibility of it when I asked you to come in at half past nine but we have been here in your absence and it was advisable to do it.

Number 2, I am going to make arrangements for you to have dinner. After the arguments and charge are over, you will have dinner. That is the custom and practice and I think you may go ahead now, Mr. Maguire.

[1019] *Closing Argument by Mr. Maguire*

Mr. Maguire: May it please the Court, Mr. Foreman and Ladies and Gentlemen, at the outset there are two or three preliminary things I would like to take up with you. First I would like to thank you on behalf of the defense for the attention which you have given to the evidence in this trial and I fully appreciate at times it has rather droned along.

Secondly, during the course of my argument, and Mr. Koen, who will argue for the government, at his Honor's suggestion, if perchance Mr. Koen argues something which I think is improper I am not going to interrupt him, but at the conclusion of his argument I will save my rights at the bench and that, of course, applies in reverse.

Mr. Reavey, I wonder if you would be good enough to wheel around the board.

[The blackboard is moved.]

The Court: I am not going to permit that outline in back to be used. I will permit the others to be used, but not that.

Mr. Maguire: If your Honor please, I wanted to—

The Court: No, I have made my ruling. I will not permit that to be used. I am not going to permit any writing on that blackboard to be used except that which went in as a matter of evidence. I just noticed it now, and that is my ruling. Come up.

[1020] [Conference at the bench:

The Court: I think it is definitely wrong to take these boards, which have been used for the purpose of having matters of an evidential nature on them, and then put something else on the back of that board without consulting this Court.

Mr. Maguire: If your Honor please—

Mr. Koen: I was not aware that that was being done, sir.

Mr. Maguire: I came here this morning. I thought it was better for the jury to follow my argument.

The Court: The jury can follow your argument. The only issue is that. Have you seen it?

Mr. Koen: No, I have not seen it, sir. Will you now direct your bailiff to erase that from the reverse side of the board, which you said was going to go to the jury room?

Mr. Maguire: I never said it should go to the jury room.

The Court: Why don't you take a look at it?

Mr. Koen: I don't want to—

Mr. Maguire: Your Honor—

The Court: I am not going to say that there are five principles. I am going to say that there are three. I am not accepting your viewpoint of the law.

[1021] Mr. Maguire: I appreciate that, your Honor.

The Court: You have got five written out there. You have saved all your rights. Anything that you need in the way of a right is precious to your client and I intend to save it for you but I can't try the case the way the government wants me to or the way the defendant wants me to. I have refused rulings on the part of the government and I think that this is a case which, under ordinary circumstances—for example, this is the kind of a case—suppose there was a verdict of guilty, this is a case where the Judge would clearly be romancing with justice if he said there is no defense and therefore I won't grant a stay. That isn't my position. These cases are cases that are just what the courts have said they are.

Mr. Maguire: Your Honor, may it appear for the record I have written on the blackboard this morning at 9:30—

The Court: I wish you had told me about it.

Mr. Maguire: I apologize. I don't think the jury has seen enough to make any damage. It is simply an outline of what I talked about in my opening, simply that and nothing more.]

The Court: Would the jury mind stepping out for about three minutes? Go outside.

[1022] [The jury retire.]

[Conference at the bench:

The Court: I don't know what is on it.

Mr. Maguire: It never occurred to me, your Honor, I wouldn't be permitted to do it. I have no intention of asking that that go to the jury room.

The Court: You can't use a board or a plan unless it is part of the evidence. Let me see it now. [Examining] What have you got to say?

Mr. Di Mento: It gives the advantage to the defendant of the benefit of the written word in argument.

The Court: What do you say about specific items of unreported income being a condition precedent?

Mr. Di Mento: We say perhaps that is one of the ways you can prove current income is taxable income, but that is not the issue here.

Mr. Koen: It serves another purpose. It seems to me to raise an argument of counsel for the defendant to almost an evidentiary level, which is certainly contrary—

Mr. Maguire: If your Honor please, I am sure you can make that clear to the jury.

Mr. Koen: I don't want to take the chance and the risk at this late stage.

[1023] Mr. Maguire: I did not intend that that should go to the jury room. Clearly it should not.

The Court: I think you have a right to use any memoranda you have in front of you. I am going to

charge this jury all the government has to show is a likely source as one of the things. If they had to show the precise amount—

Mr. Maguire: The defendant does not say that, your Honor.

Mr. Di Mento: The defendant can use the net worth statement on the other side.

The Court: For an example, you have an attempt to evade and then you have to have something done in furtherance of the attempt to evade. It isn't the attempt, it is the intent to evade.

Mr. Maguire: That is the wilful part of it, your Honor.

The Court: Then you come to whether it is wilful. I think they are wrapped up together, but you have to eliminate the element of the possibility of an honest mistake. Then you come to the additional tax owing.

Mr. Di Mento: Certainly four or five are not elements of the crime, your Honor.

The Court: Well, fixed starting point is.

[1024] Mr. Di Mento: Not an element of the crime.

The Court: It is the basis upon which you predicate the net worth theory; isn't that right?

Mr. Di Mento: That's right.

The Court: That is what he probably means by it.

Mr. Maguire: That's all, your Honor.

Mr. Koen: I don't believe that that should be shown to the jury at this late stage—

The Court: Do you want to have your rights saved?

Mr. Maguire: Yes, I do.

The Court: All right. The following is a writing:

"26 USC 145b

1. Attempt to evade
2. Attempt is wilful

3. Additional tax owing

Net Worth Theory

Jan. 1, '55	*Dec. 31, '56*	*Increase*
$100	$150	$50

4. Fixed starting point

5. Source { Income producing business / Specific items of unreported income" }

May it be noted that at half past nine this morning before court convened these marks were put on the board and were to be used by Mr. Maguire in [1025] arguing, in presenting the defendant's case to the jury. On the same boards are other matters which the Court, in the exercise of its discretion, as of now, will allow to go to the jury room. The Court is directing the deputy marshal to erase these figures, and the rights of the defendant are saved.

Mr. Maguire: May it appear, your Honor, that the defendant at no time intended to ask that the marks he put on the board go to the jury room.

The Court: May it appear also that whatever is there that is legally proper, counsel can argue without having these marks put there. Whatever else is there is a matter of evidence on that board and it has been admitted as such.

(The writing is erased from the blackboard.)]

[1026] The Court: The jury in the Pisano case can stay here and listen if they like to, but counsel may be excused until 2 o'clock.

All right, let's proceed. Bring the jury down.

[The jury enter the court room at 10:28 a.m.]

The Court: Don't get disturbed, Mr. Foreman, ladies

and gentlemen of the jury, because it takes a little time to get things organized.

Now, you may disregard those figures that were on the board there, they have been erased, and I ask you to disregard them, having in mind the fact there is to be no inference drawn against the defendant or for the defendant, one way or the other, or for the Government or against the Government. They are just to be disregarded.

All right. Does that satisfy you, Mr. Maguire?

Mr. Maguire: It does, yes, sir.

The Court: All right. Does that satisy you, Mr. Koen?

Mr. Koen: It does, your Honor.

The Court: All right.

* * *

[1068] CHARGE TO THE JURY

The Court: Now, Mr. Foreman and ladies and gentlemen, I want to express the appreciation of the Court for the attention that you have given to the testimony of these witnesses, and I have followed with careful observation on my part, sitting up here as I do, the attention that you fine ladies and gentlemen have given to all the witnesses.

I told you that I would explain in as simple language as possible the milestones, which are not mine but which have emblazoned the pathway of the kind of administration of justice that we want in a free society, a society which respects the rights of our citizens who are charged with violation of Federal statutes which carry with them penal sanctions. They are precious rights and there are corresponding rights to a couple by the name of Mr. and Mrs. America. The Sovereignty of the United States, with its complex civilization and with its obligation to enforce laws, not in conformity with rules of might but in conformity with a simple formula, the formula of justice, not in con-

formity with the expression of an opinion or a feeling on the part of myself or the United States Attorney or Mr. Maguire or any spectator or the court reporters, that the law is not a salutary law, that it is a good law or bad one; that is of no consequence. The right of Congress to enact laws affecting income is derived directly from the Constitution of the United States. There is no necessity for dwelling upon its [1069] practicability, its usefulness, and its necessity or non-necessity. The fact is that there it is, that's the law. We are to deal with it fairly and squarely, having in mind the rights of the defendant, whether or not the law has been violated in conformity with the tests that I'm going to give you.

Well, you hear a lot said about jurors being finders of fact. That means, in simple, plain language, the facts and issues that are determined by good judgment, by reason and by common sense. Consider all of the testimony, for example. You have had a chance to look at all the witnesses. You come from your respective walks of life, and I am going to say more about that later on, and you are sitting here with no prejudice of any kind, no prejudice because of any person's race or religion, because in the Golden Treasury of those that laid the foundation stone for our formula of life, our Democratic way of life, were patriots that represented all races and all religions. There were Jews and there were Protestants and there were Catholics.

They are celebrating an event tomorrow, the Battle of Concord. There were 125 men of Irish blood that participated in the Battle of Concord. The man who enunciated, who read the Declaration of Independence, and the man who rang the famous bell in the belfry announcing to the people of this country that the Declaration of Independence had been adopted at a convention in Philadelphia, was the son of an immigrant, the young man that rang that bell was

his grandson, and the one that enunciated [1070] it was the son of an immigrant.

That is the story of the worthwhile values of our American civilization, and it is in that spirit that I am going to start to talk to you this morning. I am not going to emphasize matters that have been emphasized by counsel.

Now, Mr. Foreman and ladies and gentlemen of the jury, you heard all the evidence in this case. You have listened to the arguments of counsel. I want to say to you parenthetically, however, that by no use of words, by no ruling on my part, by no expression on my countenance, by any act of mine have I indicated, directly or indirectly, my opinion, have I indicated, directly or indirectly, any bias or prejudice, and as long as I am a Judge I will zealously safeguard those precious rights. A Judge has to be something other than a wooden Indian as you used to see the wooden Indian outside of a cigar store. He has to be responsible, he has to be vocal and he has to dedicate himself to the preservation of these worthwhile, precious values.

So that it becomes the duty of the Court, and I am not going to speak about myself—I am symbolic of an institution called "the Court"—to charge you on the legal principles which are to guide you in your deliberations, and by that I mean this: You are to take these legal principles and apply these legal principles as I enunciate the law, not as I think it is but as I have determined it is from precedents that have been laid down by higher courts than myself. And it is your duty to render a [1071] verdict upon each one of the counts of the indictment, because we have six in number. That has been emphasized—five in number. Pardon me, I was thinking of the six year period. It is five in number. That has been emphasized by Mr. Maguire and it has been emphasized by Mr. Koen. I will have a little more to say about each one of them later on.

As you can see, the function of the Court and the function

of the jury are quite different. Throughout the trial I have ruled upon questions involving the admissibility of evidence. You must accept my rulings on that, just as you must accept the law as I give it to you, because no one should usurp that. That is a power that is set aside for the Court. If the Court is wrong, thanks be to God there is a place to cure any error that he makes. That is just as it should be.

You are the sole finders of the fact. Although a Judge has a right to comment on evidence in this court, in contradistinction to the State court, he can only do it in an advisory way. I am going to try to hew to the middle and to refrain from doing that. If I do have occasion to speak about it, it will only be by way of reference, and whatever I say, any way, it is your duty to disregard a statement if it is not accurate, not in accord with your memory of the testimony, just as it is your duty to disregard the statements of counsel, either for the defendant or for the Government, if they do not conform to your memory of the testimony. You should have in mind, if there is [1072] any doubt about it, we have a daily transcript and I will be happy at any time while you are deliberating to have any part of the testimony read to you.

So that it is your duty to resolve the factual issues. That cannot be taken away from you and it cannot, by the same token, be abandoned by you. It is your memory of evidence, and yours alone, which controls.

Counsel have recited, during the argument, what each one believes to have been the evidence, but you alone are the finders of fact, and you cannot allow my memory, or that of counsel, to be substituted for yours.

You must accept the law as the Court gives it to you because it is a very simple human equation. If the jury could apply its own concept of the law or what it should be, obviously we wouldn't have a government of laws, we would

have a government of chaos and we would have a government which would spell anarchy, and you wouldn't want that and I wouldn't want it, and neither would any other good American citizen want it.

As I have made it clear to you, if I am in error with regard to any phase of the law, there is a court where this error can be corrected.

In reaching your conclusions as to the facts in this case, you will have to evaluate the testimony that you have heard over this period of two and a half weeks. I know it is hard to remember it; that is why I want to place at your disposal [1073] whatever you feel might be necessary, in the light of all the attendant facts and circumstances, particularly after each one of you has exhausted his or her memory in the deliberations, and I will have more to say about that later on.

You will have to determine the degree of credibility that you will attach to the testimony of each witness. Now, along these lines, I am going to offer you some suggestions. You should give, without prejudice and without bias—I know you will do this—but in a sensible, commonsense manner, careful scrutiny to this testimony. Consider all the circumstances under which each witness testified; what was his interest; did he have or did she have, or any of the witnesses, have an ulterior motive; was any witness actuated by a desire to be unfair; what was the obligation of each witness; did his manner of answering questions indicate the kind of responsive answer that you would get from the ordinary person; was there any reason why the person should exaggerate; and I am not suggesting it, was there any reason? Was there any malice; was there any bad feeling; what was the general appearance of the witness and his demeanor; was the person to be affected by the verdict, by whatever you did, in other words, whatever your determinations; did the witness show candor or was

he fair or did he lack it; was the story reasonable or unreasonable; did the witness show an intelligent approach or did he show the lack of an intelligent approach?

[1074] The extent to which, for example, he is corroborated or contradicted by other evidence and, in short, any circumstance that tends to throw light upon his or her credibility.

Now, applying the test which I have just stated, it is for you to determine the weight which is to be given to the testimony of each witness.

I would like to say to you, in this case the indictment is in five counts. One count relates to each year for which the alleged evasion is charged. Each count must be treated separately, and unless you are convinced beyond a reasonable doubt that the defendant has evaded income tax for a particular year, you must return a verdict of not guilty as to that year. The fact that you are not convinced beyond a reasonable doubt as to one year, or that you are not convinced beyond a reasonable doubt as to another year, or the fact that you are convinced beyond a reasonable doubt, should play no part in your deliberations on the other counts of the indictment.

Now, an indictment is not evidence. The formal charge in any criminal case is contained usually in what is called an indictment. Sometimes you have it by information. That can only come in a crime like this where there is a waiver of a presentation of the evidence to the grand jury, because the defendant is entitled, under the provisions of the Constitution, to have the grand jury pass upon the evidence, and I want to say something to you about that because it is very important to the [1075] rights of this defendant that I should speak up. It is very important to the rights of every defendant, no matter what he is charged with, because what we are living under is a government of laws.

The indictment is nothing but the process by which the Government brings the defendant before the Court and recites certain allegations which, if proved beyond a reasonable doubt, show a violation of the law by the defendant. It isn't evidence, and you shouldn't consider it as such, but you have got to consider it as the accepted, logical way by which not only a defendant can be protected, but by which the Sovereignty can be protected. It must be supported by competent proof before any defendant can be found guilty and, for the purposes of this case, before this defendant can be found guilty of the charges contained in the indictment.

Now, let me give you an admonition. This defendant is being tried for income tax evasion, and income tax evasion only. You are not to concern yourself with other real or fancied violations of the law, except in so far as you feel they may be co-related, and I am not saying they are, in the light of the facts and circumstances and the law that I am giving you, with reference to the years that are covered by the indictment. I made it clear to you during the trial the Government hasn't any right, it cannot go back beyond six years. The statute of limitations runs. In some criminal offenses it runs for three [1076] years. The statute of limitations, for the purposes of prosecution in this case, could not go back of December the 31st, 1945. That is when this net worth series starts, and I will have more to say about that.

Now, let's consider the indictment for a moment, if you will. I am not going to recite figures contained therein, because the indictment will be with you in the jury room. Suffice it to say that the United States complains that the defendant in this case, William V. Massei, did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him in the years 1946, 1947, 1948, 1949, and 1950. The Government charges that in each

of those years he reported his net income—and I will make that clear to you if it becomes necessary—that he reported that falsely and he did not pay the tax which his true income would require him to pay.

Now, in order to be convicted or in order to justify a conviction, the Government must show that there was taxable income during the indictment years which the defendant failed to report. The Government must show that a tax should have been paid on that unreported income and it must establish beyond a reasonable doubt that there had been a wilful attempt to evade a portion of the tax due from the defendant, and I will tell you in simple language what that means, "wilful".

I am going to charge you that the elements of the crime can be best summarized, and this crime here, as claimed by the [1077] Government, is, first, an intent to evade or defeat; secondly, willfulness; and, thirdly, an additional tax owing.

Now, the word "attempt" as used in this charge involves two elements: an attempt to evade or defeat the tax and, secondly, some act done in furtherance of that intent, or in furtherance of that attempt. The word "attempt" contemplates that the defendant had knowledge and understanding during the years in question that he had an income in each year which was taxable and which he was required by law to report and that he attempted to evade or defeat the tax thereon, or a portion thereof, by purposely failing to report all the income which he knew he had during each calendar year and which he knew it was his duty to state in his returns.

Now, willfulness—well, willfulness may be defined as a state of mind wherein one knows of one's obligation and purposely acts in some manner to avoid that obligation. Let me repeat that; I think it is the most simple way to express it. A state of mind wherein one knows of his ob-

ligation and purposely acts in some manner to avoid that obligation.

Now, direct proof of willfulness is not necessary. Direct proof of a crime is not necessary. If it were, you would have a dark corridor behind which predatory vice could hide successfully. So that there is nothing novel about the principle of circumstantial evidence. It has been wrapped up with the trial of cases, civil and criminal, and it has, as a [1078] matter of fact, been wrapped up with that, certainly, during the whole course of this country's existence, if not long before that.

Now, willfulness may be inferred from the circumstances of a case. I want to advise you now, caution you now, that the filing of an incorrect return, in and of itself does not constitute a willful crime, doesn't constitute willfulness, in other words. It is not enough if all that is shown is that the defendant made a mistake or was careless in making out his return. Willfulness means knowingly, with a bad intent. It means having the purpose to cheat or defraud the Government of its just return on the taxpayer's income, on that upon which the income claim of the Government is predicated.

On this issue you may consider all the facts surrounding the manner in which the defendant conducted his affairs. I think one of the counsel made reference to books. Well, we have no books here and that shouldn't be considered as a circumstance in any way detrimental to the defendant's rights, not at all. But we have a formula set up which I will speak of later on which will elucidate what I mean a little bit more clearly.

Now, you may find evidence of an attempt to commit the crime of attempting to evade or defeat the payment of a tax, even though there is coupled with that intent the desire to suppress information as to acts which are criminal in other ways. In other words, if a person has X dollars, and

it represents taxable income, and an expose with reference to that source of [1079] income would result in a prosecution on some other charge, that is no justification for not filing a return in keeping with what I have already told you was the obligation of the taxpayer, and what I will make more clear to you later on.

I have said that the Government has the burden of proof. They have the burden of proof of showing that there was an additional tax owing. Now, please don't let yourselves be confused on this point. The indictment charges in each count that the defendant failed to pay specific amounts of additional tax due and owing. In order to support a conviction on each one of these counts, I am going to charge you that it is not essential that these amounts be proved to the penny. It is sufficient, if it is proved by the test that I am going to make clear to you, beyond a reasonable doubt, that a substantial portion of the tax was willfully evaded, then you would be justified in finding this defendant guilty under those circumstances, provided some other elements were made clear to you, as I will make them clear later on.

As I say, remember in this respect, as well as in all others, that as a part of your overall picture, the Government must convince you beyond a reasonable doubt, and don't get disturbed over that phrase because I will give that a clear understanding. I might as well do it now because you have heard a lot about reasonable doubt and I think an explanation probably is in order at the present time.

[1080] The Government has the burden of proving all the essential elements of the crime charged, beyond a reasonable doubt. Now, that phrase means, in simple language, this: the prosecution always assumes, and very properly so, a heavy burden in the trial of a criminal case, and I probably should say in a criminal matter. A person charged with crime is not required to prove his innocence. He is presumed to be innocent, and that presumption remains

with him throughout the trial until he is found guilty upon proof offered by the Government. This proof must be beyond a reasonable doubt. Now, all that means is that it is beyond a doubt founded upon reason. It doesn't mean a fanciful or whimsical or capricious doubt; it doesn't mean that the Government must prove the guilt of this defendant by a mathematical or by a physical certainty. It means that the Government must show guilt to a moral certainty.

When all the evidence is in and when you carefully analyze it in your jury room and you weigh it and it produces in your mind a certain conviction or belief in guilt, a conviction such as you would be willing to act upon in matters of the greatest importance relating to your own affairs, then you would be free from a reasonable doubt. I have taken a quotation from an opinion in the Holland case by a distinguished justice of the Supreme Court of the United States, Justice Clark, speaking for the Court. He said, "a doubt that would make a person hesitate to act." That is the [1081] last word that I read in connection with the judicial utterance of the Court of final jurisdiction in this great country of ours.

Now, until such a conviction is produced, or unless such a conviction is produced, then the Government has failed to carry its burden, and it would be wrong and you could not have a verdict of guilty.

I think that I will stop here now because I want the jury to get through at 1 o'clock. I have got your dinner arranged, and when you come back I will try to charge you with some celerity, but this is your first jury trial and I want to have these principles thoroughly enunciated by myself and I want to be satisfied that you have had the ground covered fully. It is going to take a little time; haste makes waste, sometimes.

[Luncheon recess.]

[Discussion off the record.]

The Court: Let me say this to you now—I don't know whether I left the thought with you or not. I was talking about reasonable doubt. When all the evidence is in, as it is in this case, when you have carefully analyzed it and weighed it and it has produced in your mind a settled conviction or belief either in favor of the defendant or against the defendant, and I put it in that way with no desire to put one above the other but for the purpose of having you understand fully what I mean—and you have a conviction such as you would be willing to act upon in matters of the greatest importance relating to your own affairs—I know I said this before, but I am going to repeat it again—then you would be free from reasonable doubt. Unless such a conviction is produced in your mind, the Government has failed to carry its burden and you should not enter a verdict of guilty, and you will have in mind what I read to you before, an excerpt from a decision by Justice Clark in the Holland case: it must be such a doubt as would make a person hesitate to act.

In this case you have not heard direct evidence of proof of a net worth income, on the question of the alleged evasion of tax due the United States Government. I think that both counsel, I am sure that Mr. Maguire spoke of direct evidence would consist of testimony on the part of the man's employer, for example—I think I will use that as an example. I think he used as an [1083] example a person in the meat business in the days of black market operations, and a man earned a certain amount of income and evidence of that sum did not appear from the man's income tax return for the year for which the money was paid, that would be evidence which would be proper for you to consider. That would be called direct evidence.

Now, you have another philosophy which doesn't emanate from this case which I told you has been associated with the growth and development of our system of jurisprudence, and I have discussed it in a manner which I think makes it inescapably clear to you what it means. You have what they call indirect or circumstantial evidence of net income shown by the so-called net worth theory. That is exactly what this case is, and I think there is no dispute over it. it. Before I explain the method of proof of income under the net worth theory, I probably should say a little bit more about circumstantial evidence, although I think I have covered it pretty well. Some circumstances which cannot be proved by direct evidence are proved by conclusions, by circumstances, rather, that gives rise to the conclusion that the simple fact exists. See if I can make that more clear to you. In criminal cases, circumstantial evidence must exclude every reasonable hypothesis other than the guilt of the defendant. The circumstances must be consistent and they must point uneeringly to the guilt of the defendant.

For example, in this case the Government began its [1084] case by showing through the figures that are on this board, testified to by an agent of the United States Government now and by a former agent, I think his name was Hurst. That is the man who said that he graduated from Harvard magna cum laude and then got through law school and was in the Government service and is a certified public accountant. They showed what is alleged to be the net worth of the defendant Massei upon the last day of 1945, in other words, on December 31st, and that is the day preceding the beginning of the indictment years.

Now, let us assume for the sake of argument, or let us assume for the moment, so there will be no objection to the use of that word, that the defendant was only charged with evasion of the taxes for the year 1946. The Govern-

ment offers evidence to establish and fix the net worth of Mr. Massei as of the start, that is, the starting point, December 31st. A person's net worth is established by listing all of his assets and all of his liabilities and then making certain mathematical computations. In other words, expressed in plain English, all that a man owns, all that he has, is added up, and all that he owes is added up, and then one is subtracted from the other and the result is the value of the man's holdings, his net worth.

The same process is followed as of the last day of the year in question, namely 1946.

Now, deducting the opening net worth from the closing net worth, we arrive at the increase in net worth. Now, if we [1085] add to this the amounts of money which the defendant spent during the year on things which would not cause an increase in the net worth, such as monies spent for living expenses and paid in income taxes, we arrive at a figure which the Government alleges reflects current income, and that portion of it which is taxable, the Government alleges, should have been reported by Mr. Massei.

The same procedure is followed for each of the years that are set forth on that board, and I am saying it this way so that I will refrain from discussing the facts for fear that something which I might say would unconsciously lead you into a channel of certainty which I think should be settled, and I say this most respectfully, in the sanctuary of your jury room in consultation by you fine ladies and gentlemen. If the figures of the Government are correct in the following year, then the fact, for example, that a taxpayer has made—well, the fact that he has made large expenditures during a given year which exceeded cash resources plus his reported income, gives rise to the inference that he has had more money than that which he has reported. An increase in net income, for example, which exceeds reported income over the period of a year, and when I speak of the

period of a year I speak of all the years, 1946, 1947, 1948, 1949, and 1950, so that what I say to you has application to all these counts. I am not trying to indicate how you should decide it. I am just giving you the yardstick. The increase over the period of a year, when unexplained—bear that in mind, when [1086] unexplained—what is the explanation? Is it an inference that the taxpayer earned more than he reported?

Before you make the inference of unreported current income; there are certain conditions that you must be satisfied on. First, the Government must establish beyond a reasonable doubt, and that is to the satisfaction of the jury, that's what it means, a likely source—remember what I am saying—a likely source of the alleged income. What, in the exercise of your sound judgment, having in mind probabilities, not dealing with the matter capriciously, what constitutes a likely source of income? In this case there has been no direct evidence of the source of the alleged unreported income. Remember how I have said that, of the alleged unreported income. In order for you to find a source, therefore, you have to make several findings. Please remember, as you travel over this highway, the burden of proof always remains on the Government. The Government, for example, must negate the possibility that the money reflected by the increase in the net worth came from gifts, loans, inheritances, or savings that were in existence at the beginning of the period for which the defendant is charged with evasion. I am going to repeat that again so that there will be no misunderstanding. The Government must negate the possibility that the money reflected by the increases, if you find these increases, in net worth from non-taxable sources such as gifts, loans, inheritances or savings in existence at the beginning of [1087] the period for which the defendant is charged with evasion. I will say

more about these possibilities when I instruct you on the question of the starting point of net worth.

Much has been said about the alleged admissions made by the defendant through his attorney, Mr. Garrity. I am now instructing you that if you believe that these statements were made by the attorney for the defendant, you may consider them against the defendant only if you find, in the light of all the facts and circumstances, that the attorney was authorized by Mr. Massei to make these statements for his client. That authorization can be implied from circumstances.

You will take into consideration, in determining that, the testimony of the Government witnesses, the story of what they said took place in Westerly, Rhode Island, the story of the statement made by the defendant himself, made in the presence of his attorney, and the story that the two Government witnesses told about what Mr. Garrity said, the circumstances of the defendant being there and the circumstances of the defendant making the statement, if he did make it, and the circumstance of the attorney making a statement dealing with the source of income, coming from grafts and gifts back in the prohibition days, the circumstance of the presence of this defendant, saying nothing, the circumstance of Mr. Garrity speaking, if he did speak. You have got to find that to be the fact, first, now, if he did.

[1088] Those circumstances are circumstances upon which you could predicate the conclusion, and it is for you, that there was an authorization, a relationship of principal and agent, so to speak.

Those remarks, if you find they were made as the Government witnesses say they were, you may consider as bearing upon the question that Mr. Garrity was authorized by his client to make these statements. You will have in mind also the way the testimony with reference to this so-called

net worth started, how it was obtained, the testimony with reference to the method of approach and investigations made by the agent, Mr. Hurst, and his talks with Mr. Garrity, the evidence that Mr. Garrity furnished, and all those are circumstances proper for your consideration, just as the testimony of Mr. Garrity itself should be considered by you. It is for you to say what that is. It has been argued that he denied he ever said what they said he did. I am going to leave that question to be settled by you entirely, without any suggestion and without anything which would indicate a point of view on my part. Use your common sense and good judgment in making that decision.

In other words, direct authority need not be found if you find that the attorney was authorized by implications and all the circumstances for the rest of the conference, and apparently there is no dispute over it, held in the office of the witness, attorney Isber, who was then one of the attorneys [1089] for the Income Tax Division. It was testified to by the Witness Isber and the Witness Hurst, who was present. You may consider statements made there by Mr. Garrity, by the defendant's attorney, against the defendant only if you find that the statements made were statements of fact, and you may not consider them against the defendant, it would be wrong for you to consider them against the defendant if you find that the alleged statements of fact were not made as such statements of fact but were made as hypotheses, as assumptions, and I take that phrase in substance from the statement, I think, and your memory controls, of Mr. Garrity himself, in the course of an argument, with no intent on the part of the attorney to make statements of fact, as such.

Where did all this information come from upon which was predicated the source of income for the five years in

dispute? You have heard the evidence. It is not for me to say, it is for you to say.

Now, if you find that the admissions alleged were made, you have to go a step further. Then it becomes your duty to determine if a source is established, because that is what is necessary. Now, I say this advisedly: the source which the Government alleges—and if I am wrong I desire to be corrected—is illegal payments by persons unknown to induce this defendant Massei to perform acts of misfeasance, malfeasance and nonfeasance, to do something that was improper, [1090] that was wrong, and that with particular application to the position which he held, a position of a fiduciary nature, a position of a police officer, a member of the police force of the City of Worcester. There is a presumption, and I am going to instruct you on this, there is a presumption that a police officer does not receive illegal payments. That is a very, very efficacious presumption, and it would apply to other men holding offices of trust and confidence, but if you find that that presumption had been rebutted, and rebutted by the test that I have given you, has been rebutted, for exaample, by the admissions made by the defendant, so far as the presumption applies to him, then I charge you that you may infer, having in mind his continued position in the police department, you may infer that continued payments of this sort were a likely source of the increases in net worth reflected by the Government's evidence, if you find that they showed it.

Now, the second prerequisite, the inference of unreported current income, is the establishment of the starting point, the net worth starting point, to the satisfaction of you ladies and gentlemen. You must find as a basis for giving the proper value to this starting point that the Government has included in the opening net worth all or substantially all of the assets owned by the defendant at that

time. In all events, let me see if I can make that clearer to you. You must be satisfied that the opening net worth includes all assets which the [1091] defendant had in the light of the defendant's assertion that the increases in net worth reflected by the Government's figures were caused by the expenditures of monies received by him from many people many years ago.

In this case the Government has endeavored to prove that the defendant did not have any assets at the beginning of the year 1946 other than those disclosed as a result of the investigation in several ways, and while this is only a passing opinion and only in an advisory way, that net worth value was somewheres around $60,000 or somewheres between $60,000 and $70,000.

Now, the Government has traced the tax return filing history of the defendant. It has shown his investment history and it has shown savings activity, which it argues is not consistent with the simultaneous possession of a cash hoard.

If you find that the Government has negated the possibility of the defendant having a cash hoard at the time of the opening net worth statement and that the defendant did not have assets other than cash which might have been converted to cash and used to acquire the assets as shown in the net worth statements, then you may infer that the net worth, the increases in the net worth, resulted from current income.

The Government is not required to refute all possible speculation that this defendant might have had assets at the beginning of the year which the investigation failed to disclose; nor is it necessary for the Government to prove the exact cost [1092] of the assets owned by the defendant at the starting point, or the precise amount of his undeposited cash on hand. It is enough if the Government, although unable to show the exact cost of his assets at that

point, can show—now, remember—can show beyond a reasonable doubt that they were insufficient to account for the subsequent increases in his net worth.

I hope I have made that clear to you. I do not want to re-emphasize it, but it is very important. So without any desire to impress upon you the importance of this, but so that you will understand it clearly, the Government is not required to refute all possible speculation that the defendant might have had assets at the beginning of the year which the investigation failed to disclose; nor is it necessary for the Government to prove the exact cost of the assets owned by the defendant at the starting point, or the precise amount of his undeposited cash on hand. It is enough if the Government, although unable to determine the exact cost of his assets at that point, can show beyond a reasonable doubt that they were insufficient to account for the subsequent increases in his net worth.

Now I have one further caveat. The Government must satisfy you beyond a reasonable doubt, and when I say satisfy you, or show you, please have in mind the obligation that belongs affirmatively to the Government—they must satisfy you that the current income was taxable. That is, that the current income was not the proceeds of gifts, loans or inheritances. [1093] In this case the defendant has not asserted that there were any gifts or loans during the indictment years, but has asserted there was money which came to him on his father's death. Now, the Government has brought in evidence to negate this assertion. For example, the father died in whatever year you find, 1948 or 1949. The brother of this defendant testified that he and the defendant were the beneficiaries, the heirs. There was a will drawn. In all events, there was a petition filed by a Mr. Bianchi, and he received $600 out of the estate. It is for you to say whether that is so or not. I say that in an advisory way. And there was a half interest in a three-

tenement house. You will have in mind, if you believe it, the testimony, if you believe that it is so, and if you believe it isn't argument, that this money came from his father's estate, who had a half interest in a tavern and had a lot of money.

You will have in mind the fact that probate proceedings were started in 1949 or 1950 by Mr. Bianchi, who was a blood relative, or who was related to the family, in some way, to the defendant in some way, and that no inventory was ever filed. Now, did this defendant receive cash from his father's estate? What are the circumstances, what are the evidences that beaconlight the highway by which you arrive at a conclusion that he did or he didn't? I leave that for you on the evidence.

In determining whether or not the starting point net worth is reasonably accurate—you have to determine that, now—the Government has to satisfy you affirmatively that this so-called [1094] net worth statement is reasonably accurate. You should consider whether or not the Government has run down all reasonable leads, and you may have in mind the testimony of the witnesses that have answered questions which deal with it. These leads were suggested to the agent by whom? Where did they get them from? You will recall the testimony of Mr. Hurst and the testimony of Mr. Garrity and the testimony of other witnesses, the testimony as to what they did in connection with other matters dealing with the source of income. You may consider whether the Government has run down all reasonable leads tending to establish the innocence of the crime charged. Did the Government explore with diligence all information, in so far as they could, advanced by the defendant or his representatives during the investigation? Was there anything in the light of human analysis and plain horse sense that you think that these Government agents could have done in order to give a true picture

of this defendant's financial condition? If you are satisfied that all these reasonable leads and explanations have been exhausted or refuted, this would be persuasive evidence which you could consider in determining whether the starting point net worth included all of the defendant's assets.

This is the position which the Government maintains as the basis for its prosecution. It is predicated upon the proposition that if a man accumulates or spends more in a taxable year than his reported income, and if it is established that he [1095] did not get these funds by loans, inheritance, gifts, savings or the sale of some property which he owned, it would seem that he must have received income.

Generally speaking, a defendant's net worth at any given time is the difference between his assets and his liabilities on that date. The prosecution has taken, as I have said before, December 31, 1945, as a base or starting point in determining the amount of his assets over his liabilities. It is not necessary for the Government to prove the defendant's net worth to a mathematical certainty. However, the Government must prove, and when I say this I mean beyond a reasonable doubt, that substantially all of the defendant's resources are included in the base or starting point computation. This starting point is the foundation stone upon which the Government's mathematical structure is erected, and the structure is only as strong as the foundation underlying it.

[1096] If I remember the witness' name—Hurst, Mr. Hurst—he developed the net worth, including expenditures of the taxpayer during the prosecution years as of December 31, 1945, 1946, 1947, 1948, 1949, and 1950. The difference between the defendant's net worth on each of those dates represents an increase for each year. And the theory goes on to demonstrate that these sums represent the defendant's increased net worth plus expenditures for each of the prose-

cution years. These are the amounts which the Government says that Mr. Massei should have declared on his income tax return as taxable income in each year. If you find such to be the fact by the yardstick that I have given you, and if you find that the defendant reported lesser amounts, it would be your duty then to find that there was an understatement of income; and, if you so find, then you must consider whether or not the question—this question can be resolved into a simple statement: Was there a wilful attempt to evade a tax due?

Now, departing for the time being from the Government's trial method, you may be puzzled by the fact that a witness for the Government—Mr. Hurst has computed what he believes to have been the defendant's income, and you may wonder as to the source of his authority. Well, the source of authority is founded on the Federal Revenue Law, and it provides that if a method of accounting employed by the taxpayer does not reflect his income clearly, a computation may be made upon such basis as in the [1097] opinion of the Commissioner of Internal Revenue does reflect such income fairly. And, obviously, that is following the rule of plain horse sense, because not everyone keeps books, as I have told you before. The Government has a right to search out, to look into, to inquire, to investigate, to detect, to assist, and to prosecute persons that violate statutes of the United States which carry with them penal sanctions.

Now I want to say this to you very frankly. You must have this in mind. The defendant has not taken the witness stand on his own behalf. But please remember this. The fact that he did not take the witness stand in no way should affect or be considered by you; it should be disregarded entirely by you. His failure to testify creates no presumption against him; and you are not permitted, it would be wrong for you to allow that fact to work in the slightest degree against the defendant. That's his sacred right. It

is set aside for a person by a salutary provision of the Constitution of the United States. So please, I beg of you, do not let it enter into your discussions and deliberations.

Now also, with respect to Mr. Massei, there has been some testimony as to his past conduct. Please bear in mind that that evidence was allowed in only as it has some bearing upon the issue of the source of the defendant's income and as bearing upon the charge before this court. You are to consider it only on that issue alone.

[1098] What we have here is the charge that the defendant wilfully violated the income tax laws of the United States. There is no other charge. The case seems to have centered upon the net worth and expenditures schedule set up upon the blackboard by a former agent, Mr. Hurst. It has been the contention of the Government that this schedule is precise and factual. It has been challenged by counsel for the defendant. Now, it's for you to give that schedule what you deem to be its proper value in this case. I am going to charge you that the evidence upon which the prosecution rests its case is that evidence which underlies the schedule. So that therefore you must find that the facts set forth on that schedule have been substantiated, they have been proved independently.

The net worth theory is the only method available to the Government in the circumstances of this case. There were no books kept by this defendant. The method used, if you are satisfied that it is exhaustive, is an adequate basis upon which to find income for the defendant. To require more than an exhaustive investigation of the visible assets of the defendant would be tantamount to holding that skillful concealment is an invincible barrier to proof of income.

The contention has been made that the payments, if you find that he received them, were received by the defendant as gifts and not taxable income. I am going to charge you that the law is to the contrary. If you find that the increases

in net [1099] worth resulted from payments made to the defendant as a member of the Worcester Police force, then such payments are income and not gifts. The mere absence of legal consideration or duty to pay does not make a payment a gift, within the meaning of the Internal Revenue Act. An intention to make a gift as such must be established.

Now, a trial such as this is a search for the truth. It is not a competition wherein the jury which decide the case must say which of the attorneys is the more skilled or more personable. It isn't a game of chance. It is and it must be the culmination of an effort to ascertain the facts. The determination of those facts is within your province. I want you to give, and I know you will, this case your full consideration, to reach a verdict that will be in harmony with the realities as you find them to be and in keeping with your collective conscience.

I want to read to you, in conclusion, what a distinguished Justice of the State Supreme Court said years ago:

> "The law requires that your conclusion in all cases shall be unanimous. No verdict can be reached by a majority however large. Your duty in striving to reach a unanimous conclusion has been repeatedly discussed and described by the great courts of this land. Taken as you are from different communities—"

and that is exactly the situation of you fine ladies and gentlemen—

> "—engaged in different callings, with different [1100] environments, and probably accustomed to regard the same questions from different points of view, it would be strange if all your minds were in the beginning affected in exactly the same way by the different considerations to which your attention has been called; nor is it desirable that any of you should surrender your individual freedom of judgment. And yet, ladies

and gentlemen, it is desirable that each of you should bear in mind that a true result cannot ordinarily be reached, just as unanimity cannot be attained, other than by mutual consideration and discussion of all variant views that may suggest themselves to any of your number; and it is important that each one of you should remember that, as he himself has no other desire than to arrive at a true conclusion upon the evidence, so each and all of his fellows are animated by the same desire, and that you should all listen to each other's views with mutual respect, and with willingness on the part of all of you to give full consideration and due weight to arguments which, though they may not at first sign seem decisive to some of you, yet have impressed themselves upon others.

"The jury room is no place for pride of [1101] opinion, or for any such persistency as may fairly be called obstinancy. A man who should withdraw himself from discussion with his fellows, who should decline to give any consideration to their views, who should say either by word or deed that his mind was made up, that an agreement could be reached only by his fellows accepting his ideas, is not fit to be a juror."

Now, this quotation goes on, referring to the rights of a jury or a member of a jury:

"Of course, if any of your number, after full consideration, and after carefully weighing the views of your associates, find yourself unable to agree with them, you are not to surrender your own deliberate and well-founded conclusions merely because they are not shared by others; but you should not obstinately adhere to any conclusions without having first exercised the greatest care to be sure that they are deliberately and well founded."

I want to impress upon you, ladies and gentlemen of the

jury, that we are not here as arbitrators between the parties, we are not here for the purpose of compromising conflicting claims. I have heard it said once in a while that there should be less law and more justice. I don't accept that. But I do say that justice is the end, clearly the end, for which both the Court [1102] and jury should conscientiously strive. But it should be justice under the law, for we live in a complex civilization, with so many varying interests and so many activities, neither the rule nor the system which we have put in operation can be considered perfect, but it is the best that great men and women tried to make it. It's our system of administering the law. Let's follow it.

Now, I have one other statement to make to counsel and the jury and then I will be finished. I want to call your attention to another alternative which I don't think I covered. I am quite certain that I didn't. If you believe that admissions were made by the defendant's attorney with authority to make admissions, you must find the admissions were corroborated before you weigh the admissions against the defendant. What is corroboration? Simply this. Some independent evidence which tends to strengthen the admissions, something which tends to bear them out, something which causes your belief in the admissions to become stronger.

I also have to say a few words to you about the other alternative presented by the evidence. If you should find that the alleged admissions were not made, or, if you find that they were made, you should find that they were made by the attorney, or if you should find they were made by the attorney without authority from his client, then I charge you that the case stands in this light. If you find the net worth is correct, if [1103] you find the increase in net worth is correct as set out, then you are left with the question of source, then you will answer the question of source—I am not charging you now—the only direct evi-

dence of source, except for the statement made by Mr. Garrity to the Internal Revenue Agent was that the defendant received a large sum of cash from his father or his father's estate. That's the only other means of evidence. If you believe this assertion as to source by the defendant, then I must charge you as to the years 1949 and 1950 that the Government has not excluded the possibility that the defendant received money from a non-taxable source and a verdict of not guilty as to these years must be returned; but if you do not believe these assertions by the defendant through his attorney as to source, then I must charge you that as to the years 1949 and 1950 you may infer that the monies reflected by the net worth evidence came from a taxable source.

Now I want to say just one other thing to you. If you find that the story about sums of money, X dollars, coming, allegedly coming from the estate of his father,—if you find that statement was so, that it was made and that it was false, then I am going to charge you and this would have reference to only one period after the father had died,—I am going to charge you that the Government is under no obligation to show a likely source if you find there has been a wilful fabrication.

Now, Mr. Foreman and ladies and gentlemen, it has taken [1104] me long to finish my charge. There were many things I had to cover, and I haven't any doubt that I have failed to cover everything. I have extreme confidence in your sagacity, your forbearance, and your humility, and in your desire to render a true verdict. I have a firm conviction that you will give this defendant his day in court. I have a firm conviction that you will give the Sovereignty of the United States its day in court. I have a firm conviction that you will return a verdict predicated upon the law and evidence, doing justice and nothing but justice—doing that because it is your duty and it's mine; without

sympathy; in keeping with your obligation you owe your sovereignty; doing nothing but justice to both parties. That's the one way to preserve our way of life. That's what courts are for. And I am sure you will speak in keeping with the true meaning of the word "verdict," which has a Latin derivation and which simply means "to speak the truth."

Now, I think I have said all that I care to say, and if there is anything counsel care to have me add, I will be happy to have them come up.

Oh, I meant to say also, you get the verdict, and there are five counts in the indictment. You will return a verdict of guilty or not guilty on each of those counts.

[Conference at the bench, during which the following is recorded:—

Mr. Maguire: If your Honor please, I would [1105] like to take the following exceptions to your charge.

First, you made reference to the Statute of Limitations, which I say is prejudicial to the defendant. I mean, it carries with it the implication the defendant was guilty of the crime prior to 1945.

Secondly, you made reference in the charge to a dark corridor where predatory crime can hide. This implies—and you used it in connection with circumstantial evidence, or the use of circumstantial evidence in this case, and that I say implies, the use of it, citing that as a reason for the use of circumstantial evidence in connection with that language I think is prejudicial to the defendant.

Thirdly,—and I will refer at the conclusion—

The Court: What was the first one now?

Mr. Maguire: The Statute of Limitations.]

The Court: [To the jury.] When I spoke about the Statute of Limitations, I want you to know that that carries with it no suggestion that this defendant,—and I made it

very, very clear,—if he was to have the circumstance of a possible crime committed before that period run against him in this case it would be very wrong for you to do it. It's the right of a person to set up the Statute of Limitations, it's a bar to criminal prosecution, and [1106] I didn't intend to cause any prejudice. I spoke of it only because we had testimony that came in in the early stages and I didn't want you to feel that because you may have found that possibly there was a place for tax evasion that therefore you could charge it up against the period that is set forth in this indictment. This testimony is confined to the four periods of this indictment covering the years from '46 through '50 and no other years.

When I spoke about dark corridors, that had no reference to this case. It was merely the reason why you have circumstantial evidence; the reason why you have circumstantial evidence, put to the test I have given it, is that it is just as reliable as direct evidence. It is recognized as a proper method of proof, and the use of that was not intended to carry with it the connotation that this defendant hid in a dark corridor. Not at all.

[Conference at the bench continues, as follows:—

Mr. Maguire: This is toward the start, if your Honor please. You made the statement, at least as I understood it, that the increase in net worth unexplained warrants the inference the defendant had more income than he reported.

The Court: That's right.

Mr. Maguire: Note my exception to that.

The Court: That's right. I think I will let it stand. Does the Government object to that?

Mr. DiMento: No, you have made that clear [1107] with all the other evidence in the case.

The Court: That's right, I did, with all the other

evidence. Read that again. What have you got? Read it again.

Mr. Maguire: That the increase that was unexplained in the defendant's net worth warrants the inference the defendant had more income than he reported.]

The Court: [to jury]. So there will be no misunderstanding, when I ask you, or said if you found there was an increase in the net worth which was unexplained by the defendant, that that warrants the inference that the defendant had more income than he reported, I am reasonably certain that I said that together with other circumstances. So as to clarify it, I clarify it now.

[Conference at the bench resumes, as follows:—

Mr. Maguire: Your statement re the presumption that a policeman is honest, the defendant excepts to the fact that you, in effect, said there is evidence in this case that rebuts that presumption.

The Court: I haven't said that.

Mr. Maguire: I believe so, your Honor. We have asked for the charge, your Honor—

The Court: It's for the jury to say whether [1108] there is evidence to rebut it. Is that all right?

Mr. Maguire: That is what you stated, sir. We state on the facts in this case there is no evidence to rebut the presumption.

The Court: You mean if a man uses as a basis for his net worth theory the statement that he collected graft and gifts for years, that doesn't affect his innocence?

Mr. Maguire: The only years in question are the years in the indictment.

The Court: That depends on the value of the net worth.

Mr. Maguire: It has to apply in the years in question.

Now, as to starting point—

The Court: The Government says they have searched and couldn't find anything. They are not concerned. The Government's position is that this increase came from sources; likely source was the same source where he got the other money. Isn't that right,

Mr. DiMento: That is right.

Mr. Koen: That is the fact,—putting it in a succinct statement.

Mr. Maguire: To that we object, your Honor.

You made reference, in talking about the [1109] starting point, you stated—

The Court: What was it I said before? Give that to me.

Mr. Maguire: We have requested a ruling, if your Honor please, that there is a presumption in this case that a police officer does his duty, and so forth, and we state as a matter of law there is no evidence in this case to rebut that presumption. You have stated the evidence is such that it is for the jury to determine whether the presumption is rebutted.

Mr. DiMento: I think that is a correct statement of the law, your Honor.

The Court: I didn't say that.

Mr. DiMento: I think what you said is the correct statement.

The Court: [to reporter]. Would you read what I said there?

(The reporter reads the following:

"The Government's position is that this increase came from sources, likely source was the same source where he got the other money.")]

The Court: [to jury]. It's the Government's contention that if you believe—if I am incorrect, I want the United States Attorney to correct me—it is the Government's contention that if you believe that these sources of monies came to [1110] him in sums which represented payments in the manner that was testified to by witnesses, having in mind his salary at the time, that a likely source of income he got as a police officer, that that likely source of income continued while he was in the Police Department down to 1950, or whatever time he retired. Isn't that your position?

Mr. Koen: That is right.

The Court: I'm not saying it. That's the Government's position.

Mr. Maguire: And I take exception to that, your Honor.

The Court: That's right.

Mr. Maguire: In fact, it is the defendant's position that they cannot infer, because of what happened in prohibition days, that that continued down through the years under indictment.

Next, if your Honor please, you made the statement relative to starting point that if the Government negates a cash hoard, the jury may infer the increase is taxable income. To that we except.

The Court: I have already answered that. I said that together with other evidence.

Mr. Maguire: You stated it, if your Honor please, in just those terms.

Next, you charged on the Adonis case theory, if your Honor please.

The Court: That's right.

[1111] Mr. Maguire: To that we state that the Adonis case in no way is applicable to the facts of the case at hand, and to whatever you said in that connection, our exception is taken.

The Court: That's right.

Mr. Maguire: You stated, again, that so far as source is concerned, an increase plus negation of sources of non-taxable income is sufficient for the jury to find that the increase alleged is income.

The Court: I didn't say that.

Mr. Maguire: I believe you did, if your Honor please.

Mr. DiMento: Increase plus negation of a non-taxable source.

Mr. Maguire: That's right, non-taxable source. It's sufficient for a finding that the increase is material income.

Mr. DiMento: I think that is a correct statement, your Honor.

The Court: I think that is, too. I said taxable income.

Mr. Maguire: Very good. That is correct. As to that we take exception, your Honor.

In your conclusion, your Honor, it seemed to me that you were talking about the blackboard with such emphasis that the jury could find or take the position that the increase standing alone was sufficient. I don't think you meant that.

The Court: As a matter of fact, I have got something [1112] written out here, but I don't know what I have done with it. I had it written out here about what was on the blackboard. I am very glad to have you remind me of that, Mr. Maguire, because I think you are entitled to have me say something about it.]

The Court: [to jury]. I am glad I was reminded of this. I should have mentioned it. Thank you very much, Mr. Maguire, for reminding me. That is why conferences at the bench help.

It is within the orbit of my discretion, I am allowing this blackboard to be taken upstairs, and I am allowing it to be taken upstairs because these schedules were placed on this blackboard by the former agent, Mr. Hurst, and by the Government employee. I think his name was Calatrello.

These compilations were made by the witnesses as a result of testimony which they heard in the court room. They are the Government's summation in graphic form of the testimony as to net worth and as to the fact that the tax due under the net worth schedule is correct and reflects taxable income for the years in question.

What I would like to say to you is this. I am going to ask you to treat these figures on this blackboard as figures which you are going to refer to as schedules. In and of themselves they have no probative value. They reflect the testimony that has come out during the trial. Now if you do not find the figures are sustained by the evidence which you have heard here, it would be your duty to reject it. So I am going to ask you to [1113] have them there. Do not have them before you as a spectre which will interfere with the obligation that is yours, to weigh all the evidence there is in the case with a determination as to whether or not this is a sound basis for a starting point. If you remember, the figures are there. They go from $61,000 to $155,104 in six years.

[Conference at the bench resumed, as follows:—

Mr. Maguire: The point that I want to make, if your Honor please, is that this increase standing alone is not sufficient for the Government's case.

The Court: I have already said that.

Mr. Maguire: I think that is the implication to the jury, your Honor.

You made the statement, if your Honor please, that there were no books or records kept.

The Court: That's right.

Mr. Maguire: I would simply like to call your attention, if your Honor please, that Mr. Hurst testified that as to the dividends and interest payments which were reflected in the defendant's tax returns for these years they were accurate.

The Court: Suppose I had told this jury, in the light of the testimony that has gone in, [1114] with this man's wife's activities, that the failure for her to take the witness stand was a circumstance which could be used against him, as decided in the case of Ford v. United States. I haven't done that. The Government hasn't argued it, and I haven't touched it. If they asked me, I would do it.

Mr. Maguire: We also—

The Court: The protection doesn't run to her. You agree with me on that. She can't be compelled to testify against her husband, but it was her duty to testify for him and when she failed, it is a circumstance to be taken into consideration.

Mr. Maguire: I would like to say, if your Honor please, another exception is that it is the defendant's position that there is no corroboration at all in the record of the defendant's alleged admissions made through his attorney, Mr. Garrity.

In your reading in conclusion, your Honor, in your charge—

The Court: I read that right from the Supreme Court decision.

Mr. Maguire: —I would simply like to [1115] point out to you it struck me that the stress in that opinion was for one juror not to be obstinate in his opinion.

The Court: That's right.

Mr. Maguire: And I grant that; but I think the other side of the point is that you should tell them they ought to have respect for the opinion of each other.]

The Court: [To jury.] I think I have made it perfectly plain,—I hope I have,—that I am not trying to put silence on any member of the jury. What I wanted you to know was this. In the sanctuary of that jury room, each citi-

zen has a right to express his or her opinion, and I know that your worthy Foreman will see that that is done. But what you do, you gather together, you consult, you respect the position of one toward the other, weigh it, put it in the scale of values and decide it in conformity with the test that I think I have made, which I do not think requires any repetition.

[Conference at the bench resumed, as follows:—

The Court: Does that take care of it?

Mr. Maguire: Finally, if your Honor please, I would like to except—I have tried to hit the high spots in taking exceptions to your charge—I would like to call to your Honor's attention in our requests for instructions that we do not feel [1116] that your charge adequately covered requests numbered 4 through 35, with the exception of No. 13, No. 16, and No. 34.

The Court: Well, what you have asked me to do in some of these requests is to rule as a matter of law.

Mr. Maguire: That is correct, your Honor.

The Court: That's the fact. I haven't done that.

Mr. DiMento: That is a shotgun way of trying to fill the record up with exceptions.

The Court: No, I am ready to give that instruction if the Government wants me to.

Mr. DiMento: We do have some suggestions, your Honor. I believe your Honor stated that the defendant's brother testified he received $600 from the father.

The Court: Did he?

Mr. DiMento: He did not receive it through the estate. He received it by virtue of being a beneficiary of the trust which was held in a bank account.

Mr. Koen: Nothing came from the estate.]

The Court: [to jury]. I was wrong. I made a statement in connection with the testimony, and of course if I make a [1117] statement of the evidence, it is purely

advisory, and apparently both counsel agree that I was wrong. The brother testified that the only benefit he received from the estate through the death of his father was a half-interest in a three-family house, that he got $600 but that came from the trust bank account, not through the estate.

[Conference at the bench resumed, as follows:—

Mr. DiMento: Now, your Honor, I think in the charge, on the so-called Adonis charge, you should make it clear to the jury that the defendant intended to convey to the representatives of the Internal Revenue Service through his attorney that sums of money received from the estate materially contributed to his increase in net worth.

Mr. Maguire: That is not the evidence, your Honor, please. There was never an amount put in there.

The Court: Well, he said materially.

Mr. Maguire: No, he didn't.

Mr. DiMento: If he intended to convey that meaning, I think the jury should consider that evidence.

Mr. Maguire: I think that should be set forth, your Honor.

[1118] The Court: Where is it?

Mr. DiMento: The starting point.

Mr. Maguire: I object to that, you Honor. There is no evidence in the record of the amount. Mr. Isber states X dollars. Mr. Hurst says no figure was mentioned.]

The Court: [to jury]. I am going to give this instruction because—

Mr. Maguire: If your Honor please, before you start I would like again to object to it. I think it is highly prejudicial.

The Court: Well, I want to do it because it isn't prejudicial, it is a correction I want to make.

Mr. DiMento: I think so. I am suggesting it for the protection of the defendant.

The Court: That's right.

Mr. Maguire: May I suggest on the record we need no help from Mr. DiMento in our case.

The Court: Well, I know, but there is still an obligation on the part of the Court to correct it, and I don't certainly intend to say anything that is in error, not in conformity with the correct statement.

Now, if you find that the defendant wilfully frabricated through Mr. Garrity an account of the receipt of non-taxable income from the father's estate, and that the defendant [1119] intended to convey to the representatives of the Bureau of Internal Revenue that the receipt of non-taxable income from that source materially contributed to his increase in net worth during any of the years named in the indictment, you may then infer that the defendant was concealing the receipt of current taxable income. And I'll save your rights on that. I make that so that will clarify and rectify what may have been a misstatement of mine, because it is for you to find what that was, and I don't want to characterize it.

Is there anything else?

Now let me again express my feeling of gratitude and kindness for your patience. It's been a long trial. I have afforded counsel every opportunity that I felt they should have. This defendant has had his day in court. The Sovereignty of the United States has had its day in court. We must have preserved at all times a vindication of our system of jurisprudence. It is very important that parties, one of which is the Sovereignty of the United States and the other of which is a defendant, a part of the Sovereignty of the United States, should leave this court room with the feeling that he has had his day in court. That is my only desire, my only purpose.

I am going to ask you to retire. I'm sorry it is going to be so late. Take your time.

Oh, yes. The time has come now for you two fine gentlemen to depart. I would hope that you have a pleasant [1120] holiday, and I think I will excuse you until next Tuesday because you have been here every day. So, good afternoon and God bless both of you. You have the appreciation of the Court for the attention that you have given. Thanks be to God twelve were able to sit through, and I know you are happy, and I am happy.

[Brief pause.]

The Court: I will give you a list of witnesses and I am going to send up—here they are. I am going to have a list of the exhibits sent up and I will be available in case you need me. The exhibits themselves, and the list of witnesses. I am going to also order, so there will be no misunderstanding—where is Mr. Maguire? Come up.

[Conference at the bench:—

The Court: So that all your rights, Mr. Maguire, will be protected—Mr. Koen, where is that photostatic copy of this board? You had some made, didn't you?

Mr. Koen: I had one made. I gave one to Mr. Maguire.

The Court: I will give you one. In case of an adverse verdict you will have it before another court. I want to have that marked. Will you agree it will go in as an exhibit, and not to go upstairs, or to go upstairs, whatever you see fit, but to be available.

Mr. Maguire: I don't care, your Honor—

[1121] The Court: If you will get that, Mr. Koen, it is agreed that may be marked.

Mr. Maguire: Please note that I object to this.

The Court: I thought you agreed to it.

Mr. Maguire: Oh, no.

The Court: You are objecting to the board.

Mr. Maguire: I am objecting to the photostat, as well. One is as prejudicial as the other.

Mr. DiMento: You don't mean for the photostat to go to the jury room?

The Court: No.

Mr. Maguire: You mean have it marked for identification?

The Court: That's right. What I meant was that it will be available if you find it necessary to go to the Appellate Court; you will have it.

Mr. Koen: I will bring those up and Mr. Walsh will incorporate them.

The Clerk: They will be marked as Government's Exhibits 44 and 45 for Identification.]

[The jury retired to consider their verdict.]

[The Court entered the court room at 6:35 p.m. and the jury at 6:38 p.m.]

The Clerk: Mr. Foreman and ladies and gentlemen of [1122] the jury, please rise. The defendant please rise.

Mr. Foreman, ladies and gentlemen of the jury, have you agreed upon your verdict?

The Foreman: We have.

The Clerk: What say you, Mr. Foreman, as to Count 1 of the indictment? Is the defendant, William V. Massei, guilty or not guilty?

The Foreman: Guilty.

The Clerk: As to Count 2 of the indictment? What say you, Mr. Foreman? Is the defendant guilty or not guilty?

The Foreman: Guilty.

The Clerk: On Count 3 of the indictment what say you, Mr. Foreman? Is the defendant guilty or not guilty?

The Foreman: Guilty.

The Clerk: On Count 4 of the indictment, Mr. Foreman, what say you? Is the defendant guilty or not guilty?

The Foreman: Guilty.

The Clerk: On Count 5 of the indictment, Mr. Foreman, what say you? Is the defendant guilty or not guilty?

The Foreman: Guilty.

The Clerk: Mr. Foreman, ladies and gentlemen of the jury, hearken to your verdict as the Court has recorded it. You upon your oath say that the defendant, William V. Massei, the defendant at the bar, is guilty on all counts of the indictment. So say you, Mr. Foreman?

The Foreman: Guilty.

[1123] The Clerk: So say you all, ladies and gentlemen of the jury?

[General assent.]

The Court: Well, now, Mr. Foreman and ladies and gentlemen of the jury, the Court does not desire to keep you any longer than is necessary because, after all, some of you have to go some distance. I notice that one of your members, one of the lovely ladies has to go to Amesbury. That is fairly close to the New Hampshire line. And I notice that another has to make a trip to Peabody, and another to make a trip down the Capeway. So that the Court desires to express its appreciation of the attention that you gave to this, and to repeat only what I said before. I have to go to a dinner myself, given to a wonderful American, Treasurer of the Massachusetts Committee of Catholics, Protestants, and Jews. Ralph Eastman is retiring as treasurer of that committee, which is probably the finest organization I know of. I happen to be lucky enough, together with one of the Judges of the Circuit Court of Appeals, to be one of the directors. They are having a dinner tonight. I am going to bid you all Good Night, and I certainly hope that you will have a pleasant holiday, and I am going to excuse you until Tuesday morning. There will be no necessity of your coming in, you are entitled to that respite, and I hope that you will be able to bask in the sunshine and feel it will bring to you health and happiness

and success to you and your families. God bless you all. See you Tuesday morning.

[1124] Mr. Maguire: May the case stand for disposition, your Honor?

The Court: Oh, certainly.

Mr. Koen: The same bail?

The Court: Same bail.

The Clerk: Present bail continued.

[Adjourned at 6:41 p.m.]

MEMORANDUM ON ADMISSIBILITY OF ALLEGED ADMISSIONS BY THE DEFENDANT'S ATTORNEY.

STATEMENT OF FACTS.

Statement of the Question

On May 20, 1952, the defendant's attorney Garrity conferred with assistant Treasury Enforcement Counsel Isber with regard to the prospect of criminal prosecution for tax evasion of the above-named defendant Massei. It is assumed, contrary to fact but for the purpose of this memorandum, that in the course of his argument that Massei should not be prosecuted criminally Garrity admitted that Massei had taken graft and bribes as a member of the vice squad of the Worcester Police Department in years prior to 1943 and that Massei had been a crooked cop. The question is presented whether or not Garrity's statements should be admitted at the criminal prosecution of Massei for evasion of taxes allegedly owed for the calendar years 1946 to 1950, inclusive.

Undisputed Facts

It is assumed that the following facts are undisputed; (a) Attorney Isber's function was to review the file compiled by the investigating agents and to determine whether or not the facts contained in the file were legally sufficient to warrant criminal prosecution; (b) Mr. Isber was the first lawyer to review the file; (c) the investigation by the Treasury Agents had been completed, at least for the purposes of the conference; (d) the setting of the conference was informal, in the sense that the participants sat around Mr. Isber's desk and conversed back and forth, with no fixed procedure; (e) no stenographer was present; (f) Attorney Garrity spoke extemporaneously and argumentatively and cited decisions of Federal Courts in analogous cases; (g) the conference lasted between one and two

hours; (h) under established Treasury Department procedure, the file would not have been transmitted to the office of Enforcement Counsel unless it contained a recommendation for criminal prosecution; (i) Garrity had no personal knowledge of the activities of his client as a member of the Police Department of Worcester.

Doubiful Facts

At least two relevant factual considerations are assumed to be doubtful, as follows: (a) The precise words used by Attorney Garrity—the admissions attributable to him being the substance or gist of what he allegedly said in urging that criminal prosecution of his client be declined; (b) whether or not Massei executed and caused to be filed with the Treasury Department a power of attorney designating Garrity to represent him and in what particulars and with what authority.

ARGUMENT.

I. The Alleged Admissions of the Defendant's Attorney Were Beyond the Scope of His Authority.

Burden and Mode of Establishing Agency

What was the scope of Garrity's authority? The burden is upon the party asserting the existence of agency to prove not only its existence but also the nature and extent or scope of the agent's authority. *Beard* v. *U. S.*, 59 F.2d 940; *Gosney* v. *Metropolitan Life Ins. Co.*, 114 F.2d 649. The party relying on a transaction with an asserted agent must establish not only the fact of agency but that the act upon which he relies was within the agent's authority. *Ferro Concrete Constr. Co.* v. *Luchini* (C.C.A. 1st), 112 F.2d 488. Agency will not be presumed but must be proved. *Nelson Development Co.* v. *Ohio Oil Co.*, 45 F. Supp. 933. There is no presumption that one purporting to act as

agent for a principal is authorized to do so. *Collins* v. *Streitz*, 95 F.2d 430.

Agency and authority cannot be proved by the hearsay statements of the alleged agent himself. *Brownell* v. *Tide Water Associated Oil Co.*, 121 F.2d 239 (C.C.A. 1st). The alleged agent's declarations out of court are inadmissible to prove his agency. *Nygard* v. *Dickinson*, 97 F.2d 53. The same is true of the alleged agent's conduct. *Mills Music* v. *Cromwell Music*, 126 F. Supp. 54; *Swift* v. *White Oak Coal Co.*, 44 App. D.C. 159.

The Authority of an Attorney at Law

It is well settled that an attorney at law, by reason of his mere employment in connection with litigation, pending or prospective, has no power to affect his client by admissions of fact made out of court and not made for the specific purpose of dispensing with proof of the facts admitted. *Horseshoe Mining Co.* v. *Miners Ore Sampling Co.*, 147 F. 517; *Humble Oil and Refining Co.* v. *Sun Oil Co.*, 191 F.2d 705. The classic statement on the point in Massachusetts decisions is by Gray, C. J., in *Moulton* v. *Bowker*, 115 Mass. 36, 40:

> "An attorney at law has authority, by virtue of his employment as such, to do in behalf of his client all acts, in or out of court, necessary or incidental to the prosecution and management of the suit, and which affect the remedy only, and not the cause of action."

It is settled law that while an attorney, by virtue of his employment, has broad powers with reference to the prosecution and management of actions and suits, those powers do not extend to matters affecting the cause of action. *De Santis* v. *Massachusetts Bonding & Insurance Co.*, 289 Mass. 315, 321. One of the many reasons behind this rule is that the facts at issue are not ordinarily within the personal knowledge of the attorney. See, e.g., *Butler* v. *Sovrensky*, 275 Mass. 88.

Construction and Requisites of Powers of Attorney

If it be assumed that the defendant executed and caused to be filed with the Treasury a power of attorney, the following principles are applicable. A power of attorney is an instrument by which the authority of an attorney in fact or private attorney is set forth. *Treat* v. *Tolman,* 113 F. 892. Powers of attorney are to be strictly construed. *Von Wedel* v. *Clark,* 84 F. Supp. 299. Courts will not infer broad powers from instruments which do not sufficiently describe the property or subject with which the agent is to deal. *Callwood* v. *Virgin Islands National Bank,* 121 F. Supp. 379.

The following provisions of Treasury Regulations (26 C.F.R., section 601.4), effective in 1952, are also significant. They are contained in rules entitled "Conference and Practice Requirements Bureau of Internal Revenue."

"POWER OF ATTORNEY REQUIREMENTS

"V. Any power of attorney offered in evidence in any case will be accepted only if it is in regular form . . .

"A. *Technical language unnecessary.* It is considered necessary in all cases that the power of attorney contain language to convey the principal's intention, though not necessarily in strictly legal form.

"B. *Attestation of execution of instrument or witnesses thereto.* The power of attorney must be executed before a notary public, or, in lieu thereof, witnessed by two disinterested individuals. The notarial seal must be affixed unless such seal is not required under the laws of the State wherein the power of attorney is executed. No attorney or agent as notary public shall take acknowledgments, administer oaths, certify papers, or perform any official act in connection with matters pending before the Bureau in which he is employed as counsel, attorney, or agent, or in

which he may be in any way interested. (See Act of June 29, 1906, 34 Stat. 622.)

"C. *Extent of authority delegated.* The authority delegated to an attorney or agent in a power of attorney enumerating certain specific acts which may be done will be considered limited to those acts . . .

"D. *Signature of grantor.* The power of attorney should be signed as follows:

"a. In the case of an individual taxpayer, by such individual.

"b. In the case of any taxable year for which a joint return was made by a husband and wife, by both husband and wife, except that either spouse may sign for the other if duly authorized in writing so to act . . .

"E. *Certification of copies of powers of attorney and evidence filed in connection therewith.* The certification of copies of powers of attorney or papers or documents filed in connection therewith must be made by a notary public, or other proper official, who should state that he has personally compared the copy with the original and finds it to be a true and correct copy. This certification applies to all copies of powers of attorney and related papers, including printed and photostatic copies . . .

"EVIDENCE REQUIRED TO SUBSTANTIATE FACTS ALLEGED IN CONFERENCES

"VIII. No reduction in taxes proposed nor increases in allowance of claims shall be made unless the evidence upon which such action is taken is submitted in writing and in verified form. All evidence except that of a supplementary or incidental character shall be submitted over the sworn signature of the taxpayer . . ."

The Capacities of the Participants in the Critical Conference

Even if it be assumed that Massei executed and caused to be filed a power of attorney valid under Treasury regulations, it is earnestly submitted that Garrity was pleading the cause of his client in the capacity of an attorney at law and in no other capacity. An understanding of the position occupied by Attorney Isber is important. Until January 8, 1952, conferences between the taxpayer and his representative and Government attorneys were liberally accorded at the level of District Counsel in Boston, Regional Counsel in New York and Chief Counsel in Washington. Thereafter, the conferences at the two higher levels were eliminated. This change came but a few months before the conference with which this memorandum is concerned. The change in procedure is described in *Balter, Fraud Under Federal Tax Law,* 2nd Ed. 1953, section 30, p. 77, as follows:

> "Thus all former reviews by the Regional Counsel and by the Penal Division of the Chief Counsel's office, by the Chief Counsel, and by the Commissioner on occasion, are ended. The numerous conferences formerly permitted at every level of review are also virtually at an end.
>
> "Only one conference will be permitted on the merits and that will be by the Enforcement Counsel in the office of the District Counsel at the level of the District Commissioner. There will be no conference with the Assistant District Commissioner, Intelligence Division; nor under any circumstances in Washington, even if a matter of policy arises in post-review; if a further conference is deemed necessary because of matters of policy indicated in post-review in Washington, the case will be sent back from the Chief Counsel's office to the level of the District Counsel for further conferences.
>
> "With this almost complete decentralization of re-

> view in the Chief Counsel's office, the question properly has been raised whether an adequate 'screening' has been provided so as to afford the taxpayer a reasonably fair protection against an unwarranted recommendation for prosecution . . .'

The subject matter of the conference was the legal sufficiency of the investigating agents' file, the bulk of its contents being unknown to the defendant's attorney. The conference afforded said attorney the single opportunity of arguing to a Treasury Department attorney that prosecution should be declined, whereas, until a few months previously, three or more such opportunities would have been available.

Rhetorical or Inadvertent Statements of Counsel are Inadmissible.

In whatever capacity Garrity was acting when he sat down with Attorney Isber, the setting, duration and nature of the conference were such that the defendant should not be prejudiced by statements of his attorney made at the time. Before admitting such statements into evidence, the Court should find that they were not made hypothetically, rhetorically, inadvertently, in the heat of argument or for the purpose of that conference only.

The principle upon which the defendant now relies is well established. "No statement made by counsel casually, or in the heat of argument or in colloquy with his adversary, is binding upon the client." *Humble Oil and Refining Co.* v. *Sun Oil Co.*, 191 F.2d 705.

In *Cadigan* v. *Crabtree*, 192 Mass. 233, 241, an action by a real estate broker for a commission was appealed to the Supreme Judicial Court which directed a new trial. At the new trial in the words of a later Supreme Court opinion:

> " . . . The defendant's counsel asked the plaintiff on cross-examination whether at the argument before the full court in *Cadigan* v. *Crabtree*, 186 Mass. 7, the

> Chief Justice did not ask the plaintiff's counsel in his (the plaintiff's) presence, 'if he contended that Miss Crabtree was acting in bad faith when she said what she testified to in January 1899.' This was excluded on the ground that the question asked by the Chief Justice was asked as to the contention of the plaintiff's counsel *for the purpose of that hearing,* and that if the plaintiff's counsel answered that question in the negative it did not preclude the plaintiff from contending at the trial in question that there was in fact bad faith on the defendant's part in revoking the plaintiff's authority. We are of opinion that the ruling was correct.'' *''Exceptions sustained.''*
>
> (Emphasis added.)

The rule for which the defendant here argues is also illustrated in *Himmelfarb* v. *U. S.*, 175 F.2d 924, wherein the Court stated:

> ''In absence of express authority, an attorney has no power to surrender substantial legal rights of his client.''

The BANKS *and* BENDER *cases*

The only reported cases even remotely similar to the instant one, with respect to the point at issue, are *Banks* v. *U. S.* 204 F.2d 666, 223 F.2d 884 and *U. S.* v. *Bender,* 218 F.2d 869. In both cases, attorneys furnished Treasury agents with documentary evidence subsequently admitted at the trial. In the *Banks* case, the document was a list of written answers of the defendant to a list of written questions prepared by the agent. The opinion leaves no doubt that the defendant's written answers were prepared by him and delivered to his attorney for the sole purpose of giving them to the agent. In the *Bender* case, the document was a work sheet prepared by the defendant's own accountant, listing receipts and expenditures of a business owned by the defendant. The question of the attorney's authority was

William V. Massei

Annual Statement of Net Worth

Assets	12/31/45	12/31/46	12/31/47	12/31/48	12/31/49	12/31/50
Cash in Banks	1600632	1487042	1083955	369970	664039	717525
Securities	-0-	550	1422845	1831524	2171191	2231250
U.S. Savings Bonds	1670625	1670625	1670625	1490625	1490625	1445625
Loans Receivable	-0-	-0-	-0-	-0-	-0-	4500
Paid-up Annuities	2766816	5388056	5388056	5388056	5388056	8382836
Real Estate	0	1125	2725	1565584	1830455	1830455
Autos	700	1721388	1213888	161388	222703	372703
Furnishings	0	0	0	800	800	800 -
Total Assets	6108073	8834611	9959369	10887097	11847069	15510454
Liabilities						
Loans Payable	-0-	-0-	125594	5000	5000	5000 -
Net Worth	6108073	8834611	9833775	10387097	11347069	14950454 -
Prev. Year Yr. Net Worth		6108073	8834611	9833775	10387097	11347069
Increase in Net Worth		2726538	999164	553322	959972	3603331 = 8842327
Cash Savings & Expenses		131340	128840	189553	200764	204650
Income Taxes Paid		107995	30370	47850	57040	68884

Net worth 12/31/50 14950454
Net worth 12/31/45 6108073
Increase in Net Worth 8842327

William V. [illegible]

Tax Computation
Tax years 1946 to 1950 inclusive

	1946	1947	1948	1949	1950
Adjusted Gross Income Corrected	2965873	1158374	790724	—	—
Less - Standard Deduction	500.-	500.-	79072	—	—
Net Income Corrected	2915873	1108374	711652	1112776	3719939
Less - Allowable Exemptions (2)	1000	(2) 1000	(2) 1200	(2) 1200	(2) 1200.-
Difference	2815873	1008374	591652	992776	3599939
Tentative tax	1207841	267182	½ Inc-Jt 295826	½ Inc-Jt 496388	½ Inc-Jt 1799970
			61082	109061	619985
Less - Tax Reduction (statutory)	60392	13358	9330	15087	57399
Difference	1147449	253823	51752	93974	562586
Combined Normal & Surtax	1147449	253823	X 2	X 2	X 2
			103504	187948	1125172
Income tax liability	1147449	253823	103504	187948	1125172
Income tax liability reported	361	416.-	477	54902	86248
Deficiency in Income tax	1111349	212223	55804	133046	1038924

not even raised, the point there being that the statement had been submitted in reliance on a promise of immunity. In both cases, the attorneys were acting as little more than messengers. Because of the importance of these decisions, excerpts from the opinions are attached to this memorandum as Appendix A.

II. The Alleged Admissions of the Defendant's Attorney Fall Within the Attorney-Client Privilege Which the Defendant Has Never Waived.

The attorney-client privilege, a fundamental principle of the Anglo-American system of jurisprudence, is stated by *Wigmore on Evidence* (3rd Ed. 1940), Vol. VIII, sec. 2292, as follows: Where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to that purpose, made in confidence by the client, are at his insistence permanently protected from disclosure by himself or by the legal adviser, except the protection may be waived.

The confidential nature of assumed disclosures by a police official to his attorney that he took graft and bribes and was a crooked cop is self-evident. Also, it is elementary that (a) the privilege belongs to the client, not the attorney, and may be waived only by him, and (b) the client is protected not only from direct disclosure by the attorney's testimony on the witness stand but also by indirect disclosure by the attorney's testimony on the witness stand but also by indirect disclosure by the attorney's voluntary extrajudicial disclosures, unless this protection is waived by the client. The sole question, then, regarding the availability to the defendant in this case of the protection of the attorney-client privilege, which would bar evidence of the attorney's alleged admissions out of court, is whether or not the defendant waived the privilege. On this issue, as in most questions involving waivers, the burden of

establishing the waiver is on the party asserting it. "Whether a waiver has occurred depends upon the circumstances of each case. A waiver involves the intentional relinquishment or abandonment of a known right or privilege. A strong presumption is raised against the waiver of fundamental rights by an accused." *Himmelfarb* v. *U. S.*, 175 F.2d 924, 931.

Thus far the Government has offered no evidence whatever of a waiver. When such evidence is offered, the following circumstances should be accorded great weight: (a) The gravity of the admissions allegedly made by the attorney; (b) the notice or actual knowledge or lack thereof on the part of the defendant of the conference at which the alleged admissions were made; (c) the absence of the defendant from said conference; (d) the subject of said conference, viz., whether or not Attorney Isber would recommend criminal prosecution or administrative disposition of the case against the defendant; and (e) the logical absurdity of the attorney's alleged admissions—they might be compared to the attorney for Jones, charged with theft from Brown, entering as a defense that such a crime was impossible because Jones had murdered Brown at a time beyond the statute of limitations.

III. The Relevancy, Competency and Materiality of the Alleged Admissions Should be Demonstrated by the Government Before Said Admissions are Received in Evidence.

At this juncture of the case the defendant has not yet been apprised whether the alleged admissions of his attorney are being offered in evidence as true statements or false statements. If the former, it is crystal clear from recent decisions of the Supreme Court of the United States that they must be corroborated. *Smith* v. *U. S.*, 348 U.S. 147; *U. S.* v. *Calderon*, 348 U.S. 160; *Opper* v. *U. S.*, 348 U.S. 84.

Loans Payable	-0-	-0-	175594	5000	5000	5600-		Increase in Net Worth 884327
Net Worth	6108073	8834611	9833775	10387097	11347069	149504-		
Five Year Net Worth		6108073	8834611	9833775	10387097	11347069		
Increase in Net Worth		2726538	999164	553322	959972	3603331	= 8842327	
Cash Items Expenses		131340	128840	189552	200764	204650		
Federal Taxes paid		107995	30370	47850	55040	68884		
Total		2965873	1158374	790724	1112776	3876863		
Less - Capital Gain Adjust (Non-tax)		-0-	-0-	-0-	-0-	56924		
Gross Income Corrected		2965873	1158374	790724	1112776	3819939		
Gross Income Reported		323262	353966	454928	—	—		
Unaccounted for Gross Income		2642611	804408	335796			= 3782815	
U.S. - Statutory Standard Deduction					1000-	1000-		
Net Income Corrected					1112776	3719939		
Net Income Reported					450444	603157		
Unaccounted for Net Income					662334	3116782	= 3779116	

Difference	[illegible]	[illegible]		591652		992776		3599939
Tentative tax	12078 44	2671 82	½ Inc-Jt	2958 26	½ Inc-Jt	496388	½ Inc-Jt	1799970
				610 82		1090 61		6199 85
Less-Tax Reduction (statutory)	603 92	133 58						
Difference	11474 49	2538 23		93 30		150 87		573 99
				517 52		939 74		5625 86
Combined Normal & Surtax	11474 49	2538 23		X 2		X 2		X 2
				1035 04		1879 48		11251 72
Income tax liability	11474 49	2538 23						
Income tax liability reported	361	416 -		1035 04		1879 48		11251 72
				477		549 02		862 48
Deficiency in income tax	11113 49	2122 23		558 04		1330 46		10389 24

Summary

1946	1111349
1947	212223
1948	55804
1949	133046
1950	1038924
	2551346

Total Deficiency

In the Smith case Mr. Justice Clark stated, "An admission which assumes this importance in the presentation of the prosecution's case should not go uncorroborated, and this is true whether we consider the statement an admission of one of the formal 'elements' of the crime or of a fact subsidiary to the proof of these 'elements.' It is the practical relation of the statement to the Government's case which is crucial, not its theoretical relation to the definition of the offense." In this case, the Government should be required to indicate, at least in a general way, having in mind that there have already been three full days of trial, the nature of the evidence, independent of the defendant's alleged vicarious admissions, which will establish that he took bribes and graft when he was on the vice squad of the Worcester Police Department. Unless such corroborating evidence is forthcoming, the testimony regarding the attorney's alleged admissions should be stricken at the conclusion of the Government's case. It is earnestly submitted that the evidence in question should not be admitted unless it will contribute affirmatively to the ultimate outcome of the prosecution.

Furthermore, even if corroborating evidence is forthcoming, what is the relevancy and materiality of the alleged admissions?

On the other hand, if the attorney's alleged admissions are being offered as false statements, how is their falsity to be demonstrated and how are they relevant? Regarding the defendant's attorney's purported statement that the defendant was a crooked cop five and more years before the first offense charged, does the Government propose now to prove that, in those years, he was an honest cop? How? And for what purpose?

The case of *U. S. v. Adonis*, 221 F.2d 717, has been mentioned in discussions between counsel as being analogous to the instant case. The defendant urges that the

Government be required at this juncture to state the extent, if any, to which it is here relying upon the similarity of that decision. In that case, "considered" and undisputed statements of the defendant on the witness stand in a prior court proceeding were held to be "calculated misrepresentations." As stated at p. 719 of the opinion, "It is this logical inference from the taxpayer's *own wilful misrepresentations* upon which the government relies here * * *." (Emphasis added) In the case at bar, does the prosecution contend that the statements of Attorney Garrity in the course of his discussion with Attorney Isber were calculated, wilful misrepresentations? Does the prosecution take the position that the defendant knew what his attorney was going to say at the conference with Mr. Isber, and does it intend to offer proof on that point? Or, perhaps, does the prosecution charge the attorney with an intent to deceive Mr. Isber and seek to convict the defendant not because he was a crooked cop in 1942 but because he engaged a crooked attorney ten years later?

The key to a correct understanding of the *Adonis* case, it is submitted, is that Adonis lied about the nature of the receipts which he admitted having received during the year for which he was indicted. The following portion of the opinion, at p. 719, can leave no doubt on that score:

> "The government undertook to convince the jury, first, that the appellant had made considered statements identifying particular sources from which he claimed to have *obtained specific large non-taxable sums during 1948*, and second, that he clearly had not received any such sums from those sources. It is argued that if the jurors were convinced that the taxpayer had thus wilfully fabricated an account of *current non-taxable receipts* to explain his 1948 affluence they might reasonably infer that such conduct was an effort to conceal the fact and real sources of taxable

gain in that year * * * Accordingly, we analyze the evidence to see whether there was a clear and impressive showing that the appellant wilfully misrepresented the source from which he obtained *large amounts of money in 1948.*" (Emphasis added.)

CONCLUSION.

The defendant urges that the forest not be lost sight of because of the trees. The basic concept of admitting in evidence the admissions of the accused is that they have all the earmarks of credibility and the accused cannot raise the objection that he should be given an opportunity to cross-examine himself. It is submitted that the evidence which the prosecution proposes to introduce, that the defendant's attorney admitted that his client was a grafter and crooked cop, has all the earmarks of incredibility. Please consider the precept stated in *U. S.* v. *Bridges,* 133 F. Supp. 638, that testimony as to oral admissions is received with caution in criminal cases.

Finally, the presiding judge in this case stated, when first informed of the nature of the proof offered by the prosecution, that he had never heard of such a thing in forty-five years' experience as an attorney and judge. The reported decisions contain no proof of crime even remotely comparable to the one which the prosecution proposes here. Does not the absence of such proof in thousands upon thousands of reported criminal cases speak more loudly and clearly than any words in this memorandum, that the admission in evidence against the accused of the oral statements of the attorney to whom he entrusted his liberty would be violative of the spirit of fair play and decency upon which all justice and morality ultimately rests?

Respectfully submitted,

Defendant's Attorney

APPENDIX A.

Banks v. *United States*, 204 F.2d 666, 670

". . . The revenue officer submitted to O'Gordon a list of questions to which he requested answers. Answers of the defendant were obtained by O'Gordon on a separate sheet of paper and delivered to the revenue agent. O'Gordon was called as a witness by the government and identified the paper containing the list of questions as Exhibit 70 and the paper containing the answers as Exhibit 71. They were received in evidence over the objection of counsel for defendant.

* * *

". . . The information requested was furnished by Banks to O'Gordon for the sole purpose of giving it to McKusick in answer to McKusick's questions. O'Gordon was therefore acting within the scope of his authority as Banks' agent."

Banks v. *United States*, 223 F.2d 884, 887-888

". . . McKusick then submitted to him a list of questions (exhibit 70) concerning appellant's business transactions which had been discovered in the investigations and requested him to obtain the answers of appellant. In the following February Mr. O'Gordon returned the questions with the answers of appellant on a separate sheet of paper (exhibit 71). Mr. O'Gordon testified at the trial and identified the exhibits.

"/6/ The admissions in these exhibits amply support the verdict of the jury. And the admissions are amply corroborated by the evidence . . . "

"Appellant's argument overlooks the fact that the admissions in exhibits 33, 70 and 71 were his own statements

in answer to questions of the revenue agents and that they were all connected with the investigations made by the revenue agents. . . . ''

United States v. *Bender*, 218 F.2d 869, 872

''The defendant claims that the admission of Government Exhibit 55 was error. Exhibit 55 is a work sheet, prepared by defendant's own accountant from cancelled checks, receipts, etc., in the course of preparing defendant's income tax return. It lists all the individual expenditures and income declared by Bender in his syrup business for the year of 1946. The total 'Sales' and 'Purchases' listed on the Exhibit are the same as those in Bender's tax return.

* * *

''/6, 7/ Bender's contention that Exhibit 55 was improperly obtained by the Government is also without merit. The record shows that Government agents did not obtain the work sheet with, as Bender claims, the promise of dropping the criminal charges against him. . . . ''

MOTION FOR VERDICT OF ACQUITTAL.

Now comes the defendant and moves for a verdict of acquittal on each of the five counts of the indictment on the grounds that the evidence on each count is not legally sufficient to support a conviction.

By his attorney,

(s) RICHARD MAGUIRE
RICHARD MAGUIRE

REQUESTS FOR INSTRUCTIONS.

1. The defendant has been indicted in five counts for alleged tax evasion under 26 USC 145(b). Each count covers a separate year, 1946, 1947, 1948, 1949 and 1950, and each count must be treated separately. This means that the Government must sustain its burden of proof on each count as though it were a separate crime.

2. The crime of tax evasion is set forth in 26 USC 145(b) has three elements:

(a) Attempt to evade;
(b) That the attempt was willful;
(c) An additional tax is owing.

3. In this case, the Government does not attempt to prove its case by direct proof of evasion such as unreported sales or illegal deductions. Instead, it attempts to prove its case on the so-called net worth theory which is another way of stating that it attempts to prove its case by circumstantial evidence.

4. Because the Government does attempt to prove its case by this net worth theory, the jury must scrutinize the evidence offered by the Government particularly closely. The use of this net worth method is so fraught with danger for the innocent that the jury must be unusually alert in scrutinizing the evidence offered by the Government.

5. The Government has offered evidence showing the amount of assets that the defendant allegedly had at the

beginning of each year for which he has been indicted. The Government's figures show an increase at the end of each year under indictment. The proof of such an increase does not prove the crime of tax evasion. Because the Government is using the net worth theory, there are two additional elements that the Government must convince you of in order to prove its case.

6 The Government must establish with reasonable certainty an opening net worth to serve as a starting point from which to calculate future increases in the defendant's assets. If the jury should find that the defendant had a large amount of cash on hand which was not included in the Government's opening net worth position, the defendant must be acquitted.

7. Before you even consider the question of whether there has been a tax evasion the Government must have satisfied you beyond a reasonable doubt of the amount of assets the defendant has at the beginning of each year for which he has been indicted. In other words, the Government must convince you beyond a reasonable doubt that it has discovered all of the assets owned by defendant on December 31, 1945 and has included them in the evidence which has been introduced at the trial. If you find that the defendant had substantial assets on December 31, 1945 other than those shown at the trial, it then follows that the defendant's alleged net worth increase must be reduced.

8. The fifth element which the Government must establish is that of source. The defendant's net worth increases must be attributable to currently taxable income. This means that the Government must satisfy you that in each year involved the defendant received the amount of the increase as alleged and that the increase was currently taxable income.

9. Under the cases, there are two methods by which the Government establishes source. The first is by showing

that the defendant is in an income producing business which would be a likely source for the increase in the defendant's assets. One good illustration of this type of proof is in the *Holland* case where the defendant was in the hotel business and there was ample evidence that not all the income from the hotel had been included in its books and records. Another illustration is the *Johnson* case where the defendant owned a string of gambling houses.

10. In the present case, we are not concerned with this type of proof of source. First of all, the defendant was a salaried employee of the City of Worcester, and, therefore, had an undisputed ceiling on the amount of money which he could receive from that source. Secondly, the Government in its Bill of Particulars answered that the likely source of the unreported income of the defendant for the years in question was money received by him for the nonperformance of his official duties by persons engaged in illegal activities in Worcester. This means that the Government is relying on specific items of unreported income as its evidence of source.

11. The other method of proving his source is by specific items of unreported income. This is the method which the Government by its Bill of Particulars is bound to in this case. A good illustration of proof under this method is the *Chapman* case wherein seven meat peddlers testified to over-the-ceiling black market payments for meat. The testimony was that the payments were made during the years under indictment. Another illustration is the *Skidmore* case where witnesses in the bookmaking business testified that they paid to the defendant money every month during the years under indictment for protection.

12. The use of the words "likely source" means simply that the Government need only establish that there was such a source for the defendant's income and not by proof estab-

lish that every dollar of the alleged increase came from that source.

13. Once the Government has established source or likely source they have the additional burden of negativing reasonably other possible nontaxable sources of the defendant's alleged increase such as loans, inheritance, gifts, and so forth. By reasonably negativing other nontaxable sources it is meant that the Government must check out all explanations that are reasonably susceptible of being checked, but that the Government does not have the burden of negating every possible source of nontaxable income.

14. There is one other method used by the Government in proving source, namely, the *Adonis* case, which does not concern us in this case.

15. The five elements of the crime charged which the Government must prove against this defendant are as follows:

(a) An attempt to evade;
(b) The attempt must be willful;
(c) An additional tax owing;
(d) Establish a starting position with reasonable certainty;
(e) Establish the source of the defendant's income by evidence of specific items of unreported income.

The burden of proof on each of these five elements is on the Government to convince you beyond a reasonable doubt. If for example the evidence introduced on the question of source does not satisfy you beyond a reasonable doubt that the defendant received the alleged increase in each of the years under indictment, the defendant must be acquitted.

"Beyond a reasonable doubt" means that you must reach the conclusion on each of the five elements of the crime that the Government has proved its case to the degree of

certainty that would lead you to act on the faith of it in the most important and critical affairs of your life.

16. You may draw no inferences from the fact that the defendant did not take the stand. He has a constitutional right not to do so, and there may be many reasons why he does not do so which have nothing to do with this case.

17. There has been evidence as to admissions of the defendant made in the form of his attorney's letters addressed to Special Agent Hurst answering various questions raised by Hurst and also of alleged oral admissions. There is no factual issue regarding the statements contained in the letters sent to Special Agent Hurst. Their contents were furnished by the defendant to his attorney with the knowledge and intent that they be transmitted to the Treasury Agent. No objection was made to the admissibility in evidence of the letters.

18. Testimony as to oral admissions is received with caution in criminal cases.

19. As a general rule statements made out of court are not admissible in evidence at the trial. This is known as the hearsay rule. One of the exceptions to that rule is that statements made by the defendant himself are admissible against him. An extension of that exception is that statements made by an agent of the defendant are equivalent to statements of the defendant himself and are admissible in evidence against the defendant on the same basis as if the defendant had himself spoken, if and only if certain other facts are first proved.

20. An attorney at law, simply because of his employment in connection with prospective litigation, has no authority or power to affect his client by admissions of fact made out of court and not made for the specific purpose of dispensing with proof of the facts admitted. In this case there is no evidence of any such specific purpose of dispensing with proof.

21. The fact of authority or agency must be proved by the party asserting it, in this case the Government. Furthermore, the proof must be independent of evidence of acts and words of the asserted agent out of court. In this case, insofar as agency or authority may be proved by statements or events before the trial, it must be shown by the actions or inactions and words or silences of the defendant and not those of his attorney.

22. Unless you find as a fact that the defendant authorized his attorney to make oral admissions of fact binding upon him, then you must disregard his attorney's statements made prior to the trial.

23. Unless you also find that the defendant authorized his attorney to make the specific statements at issue here, namely, that the defendant took gifts or graft during prohibition days and while a member of the vice squad, you may not consider evidence of such statements.

24. As a matter of law, in view of the undisputed circumstances relating to the conference in Mr. Isber's office on May 20, 1952, the statements of the defendant's attorney at that conference may not be considered by you and should be completely disregarded by you.

25. As a matter of law, the attorney's statements to Special Agent Hurst in Hurst's office on January 24, 1952, may not be considered by you and should be completely disregarded.

26. Before considering each of the alleged statements of the defendant's attorney against the defendant, you must further find that the facts contained in the attorney's statements were received by him from the defendant or, if received from others, confirmed by the defendant.

27. If you find that the defendant authorized his attorney to make the statements in issue to the representatives of the Treasury, it then becomes your duty to analyze the testimony to determine the nature of the statements. There

has been conflicting evidence on this issue. The Government takes the position that the statements were deliberate admissions of fact. The defense takes the position that the statements were argumentative and hypothetical or based on assumptions, expressed or implied. Unless you have been convinced by the Government that the attorney's statements were factual and deliberate, you may not consider them against the defendant.

28. In deciding the issue of the nature of the statements, you should weigh the surrounding circumstances, such as the undisputed circumstances that Mr. Isber was the first Government attorney with whom Mr. Garrity conferred, that no stenographer was present and that the setting of the conference was informal.

29. Moreover, the alleged admissions must be corroborated by evidence independent of the admissions, if you find that the statements were in fact admissions. In this case you may not consider against the defendant his alleged admissions that he took gifts and graft in prohibition days and while on the vice squad, unless your finding is fortified by evidence apart from these alleged admissions.

30. As a matter of law the alleged admissions of the defendant by his attorney have not been adequately corroborated and may not, therefore, be considered by you.

31. In deciding the issue of the attorney's authority to make the alleged oral admissions as to the defendant's having received gifts and graft in prohibition days and while on the vice squad, another legal principle is applicable; namely, an attorney may not disclose confidential communications of his client unless there has been a waiver by the client or, in other words, the client permits. This is a fundamental principle of the American system of jurisprudence. It applies when the communications of the client to the attorney are of a confidential nature and are communicated by the client to the attorney with the intent that

they remain undisclosed. This privilege belongs to the client, not to the attorney, and may be waived only by the client.

32. As a matter of law all testimony of statements of the defendant and of his attorney having to do with the defendant's activities in prohibition days must be completely disregarded by you, for the reasons that such testimony is irrelevant to the issues in this case, it is too remote in point of time to be probative and is highly prejudicial to the defendant.

33. As a matter of law all testimony of statements of the defendant and of his attorney having to do with the defendant's activities while a member of the vice squad must be completely disregarded by you, for the reasons that such testimony is irrelevant to the issues in this case, it is too remote in point of time to be probative and is highly prejudicial to the defendant.

34. There is a legal presumption in favor of the defendant in this case by reason of the fact that he was a law enforcement officer. It is presumed that a public official faithfully performs his duties. This presumption must be considered by you unless and until you consider the evidence of the alleged admissions by the defendant's attorney according to the rules which I have heretofore stated.

35. As a matter of law the Government has offered insufficient evidence to deprive the defendant in this case of the presumption in his favor that he faithfully performed the law enforcement duties which fell upon him as an official of the police department.

Attorney for Defendant

JUDGMENT AND COMMITMENT.

On this 8th day of May, 1956, came the attorney for the government and the defendant appeared in person and by counsel.

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty, and a verdict of guilty of the offense of violating Title 26 U.S.C. Sec. 145(b) (5 counts) (evasion of Income Taxes) as charged in said Indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of two years, and to pay a fine in the sum of five thousand (5,000) dollars.

IT IS ADJUDGED that the execution of sentence be stayed pending appeal.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

(s) WILLIAM T. MCCARTHY,
United States District Judge.

The Court recommends commitment to:

Clerk.

NOTICE OF APPEAL

Name and address of appellant:

William V. Massei
15 Westview Avenue
Shrewsbury, Massachusetts

Name and address of appellant's attorney:

Richard Maguire, Esq.
31 Milk Street
Boston 9, Massachusetts

Offense:

Tax evasion, violation of 26 U.S.C. Section 145(b), 5 counts for the years 1946 through 1950.

Concise statement of judgment or order, giving date, and any sentence:

Appellant was found guilty on all five counts on April 18, 1956 and on May 8, 1956 the following sentence was imposed:

"Defendant sentenced to two years in prison, and to pay a fine in the sum of $5,000.00. Execution of sentence stayed pending appeal."

The appellant is now on bail pending appeal.

I, the above-named appellant, hereby appeal to the United States Court of Appeals for the First Circuit from the above-named judgment.

Dated: May 11, 1956

(s) RICHARD MAGUIRE
Attorney for Appellant

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 5132.

William V. Massei,
Appellant,
v.
United States of America,
Appellee.

STIPULATION AS TO EXHIBITS.

Now comes the United States of America and the appellant, William V. Massei, and say that by reason of the fact that the exhibits in the above-entitled case were voluminous and that the expense of reproducing the same would be prohibitive, and by reason of the fact that the appellant has excepted to the denial of his motion for acquittal based on the ground that there was not sufficient evidence to convict him and such exception requires that all of the exhibits must therefore be available for inspection by this Court whether considered relevant by the appellant or not, now therefore it is stipulated and agreed:

That all of the exhibits, which are not included in the statement of the parts of the record to be printed in the record appendices, may be omitted from reproduction and may be referred to in their physical form by the Court and counsel with the same force and effect as if reproduced in a record appendix.

(s) WILLIAM J. KOEN
Assistant United States Attorney

(s) THOMAS J. CARENS
Attorney for Appellant

The above stipulation is hereby approved.

(s) CALVERT MAGRUDER
Circuit Judge

9 July 56

POINTS UPON WHICH APPELLANT INTENDS TO RELY.

The appellant intends to rely upon the following points in appealing from the judgment of the United States Court for the District of Massachusetts entered May 11, 1956:

1) Failure to allow appellant to be heard and offer evidence in support of his motion to dismiss indictment because of improper presentation of evidence to Grand Jury.

2) Failure to allow appellant to be heard and offer evidence in support of his motion to inspect Grand Jury minutes.

3) Failure to grant motion to dismiss for failure of appellee to file adequate answer to appellant's motion for Bill of Particulars as it related to the source of appellant's alleged unreported income.

4) Failure to grant motion to dismiss based on violation of appellant's rights to a speedy trial under the Sixth Amendment of the Constitution of the United States.

5) Failure to grant appellant's motion for ten day continuance in order to prepare his defense upon learning that appellee intended to introduce evidence outside the scope of the Bill of Particulars it had filed.

6) Failure to allow hearing and introduction of evidence in support of appellant's motion to suppress evidence appellee was to introduce at the trial relating to alleged admissions of appellant through his attorney.

7) Failure to allow appellant to make an offer of proof after denial of his motion to suppress.

8) Failure to allow appellant's motion for a mistrial after the Court ruled it was going to admit into evidence the alleged admissions of appellant through his attorney.

9) Failure to allow appellant to make an offer of proof after denial of his motion for mistrial.

10) Admission of appellant's tax return for the year 1945. (Government Exhibit 1)

11) Admission of Certificate Of Assessments And Payments Of Appellant (Government Exhibit 7) for years 1920 through 1944.

12) Exclusion of testimony of John L. Bianchi as to relationship of appellant and appellant's deceased father.

13) Ruling after voir dire examination that testimony of Harold L. Hurst as to alleged admissions made by appellant's counsel was admissible on ground that the question of the authority of counsel to make admissions binding on appellant was for the jury.

14) Ruling at voir dire examination on Charles J. Isber's testimony as to alleged admissions of appellant's counsel that no evidence would be received that would indicate the statements of appellant's counsel were contentions or arguments, and not facts.

15) Refusal of Court to allow cross-examination of Charles J. Isber on voir dire examination aimed to bring out circumstances that would show alleged admissions of appellant's counsel were contentions or arguments and not admissions of facts.

16) Ruling after voir dire examination that testimony of Charles J. Isber as to alleged admissions made by appellant's counsel was admissible on ground that the question of the authority of counsel to make admissions binding on appellant was for the jury.

17) Admission of testimony of Harold L. Hurst as to conversations with appellant's counsel, appellant not being present.

18) Admission of testimony of Harold L. Hurst as to a conversation with appellant and appellant's counsel.

19) Exclusion of question put to Charles J. Isber that, in conference with appellant's counsel, counsel cited to him applicable decisions.

20) Refusal of Court to rule on appellant's motion for verdict of acquittal at the close of appellee's case.

21) Exclusion of questions put to appellant's counsel as to his personal knowledge of appellant's activities during prohibition days or while on the vice squad.

22) Denial of appellant's motion to strike all evidence relating to alleged admissions of appellant's counsel.

23) Denial of appellant's motion to mark for identification brief submitted by appellant at time of voir dire hearing.

24) Denial of appellant's motion to strike testimony as to tax payments of appellant for years not under indictment.

25) Refusal to grant appellant's motion for verdict of acquittal, as renewed, at close of all the evidence.

26) Refusal to allow appellant's counsel in his argument to the jury to use blackboard to outline his argument.

27) The Court erred in charging the jury that:

(a) Unexplained increase in net worth warrants inference that appellant had more income than he reported.

(b) Jury could infer from alleged admissions of illegal payments prior to indictment years that such illegal payments continued during indictment years.

(c) Negation of cash hoard by appellee at beginning of period is sufficient basis for the jury to infer that increases in net worth are income.

(d) Jury could find a deliberate fabrication by appellant and so infer that an increase in net worth was income.

(e) An increase in net worth plus negation of sources of non-taxable income is sufficient basis for the jury to find that the increase alleged is income.

(f) There was evidence from which jury could find corroboration of alleged admissions by appellant's attorney.

(g) There was evidence from which jury could find that appellant deliberately fabricated the receipt of

non-taxable income from his father's estate and that said source materially contributed to an increase in his net worth.

28) The Court erred in failing to charge in accordance with appellant's requests for instructions numbered 4 through 35 with the exception of Nos. 13, 16 and 34.

29) The Court allowed a blackboard with computations on it to go to the jury room without adequate instructions.

(s) RICHARD MAGUIRE
Appellant's Attorney

PARTS OF RECORD TO BE PRINTED IN APPENDIX TO APPELLANT'S BRIEF.

The appellant proposes to print, in the appendix to his brief, the following parts of the record:

1) Docket entries.
2) Indictment.
3) Arraignment and plea.
4) Motion to Dismiss, filed February 25, 1953.
5) Motion to Inspect Grand Jury Minutes.
6) Defense counsel's letter dated June 25, 1953.
7) Motion for Bill of Particulars.
8) Bill of Particulars.
9) Motion to Dismiss for Inadequacy of Bill of Particulars.
10) Motion to Dismiss for Failure to Grant Appellant a speedy trial.
11) Motion for Hearing On Motion to Dismiss filed February 25, 1953.
12) Motion to Suppress.
13) Stenographic transcripts of hearings before trial on the following dates:

(a) May 16, 1955
(b) June 6, 1955
(c) June 27, 1955
(d) October 5, 1955
(e) November 1, 1955
(f) January 9, 1956
(g) February 27, 1956
(h) April 2, 1956

14) All trial testimony and proceedings, Volumes I through XIII, inclusive, except:

(a) The Court's opening remarks, page 2, line 8, through page 9, line 18.

(b) The opening statement of the prosecuting attorney, page 93, line 17, through p. 100, line 19.

(c) Closing argument of defense counsel, page 1026, line 22, through page 1048, line 8.

(d) Closing argument of the prosecuting attorney, page 1048, line 9, through page 1067, line 3.

15) Memorandum on admissibility of alleged admissions by the defendant's attorney, offered as an exhibit for identification at page 624, line 1, and at page 968, line 20.

16) Government's exhibit 44 for identification, entitled "Annual Statement of Net Worth".

17) Government's exhibit 45 for identification, entitled, "Tax Computation".

18) Motion for Verdict of Acquittal.

19) Appellant's Requests for Instructions.

20) Judgment and Commitment.

21) Notice of Appeal.

22) Stipulation as to exhibits.

23) Statement of points upon which appellant intends to rely.

24) This statement.

(s) RICHARD MAGUIRE
Appellant's attorney

795 Minute entry of argument and submission—November 7, 1956 [omitted in printing].

797 In United States Court of Appeals for the First Circuit

No. 5132

WILLIAM V. MASSEI, DEFENDANT, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS

Before MAGRUDER, Chief Judge, and WOODBURY and HARTIGAN, Circuit Judges

Richard Maguire, with whom Thomas J. Carens was on brief, for appellant.

Daniel Needham, Jr., Assistant U. S. Attorney, with whom Anthony Julian, United States Attorney, was on brief, for appellee.

Opinion of the Court

February 27, 1957

HARTIGAN, Circuit Judge. This is an appeal from a judgment entered in the United States District Court for the District of Massachusetts upon the verdict of a jury finding the appellant guilty on each of five counts of an indictment charging him with willfully and knowingly attempting to defeat and evade a large part of the income tax due and owing by him and his wife to the United States for the calendar years 1946, 1947, 1948, 1949 and 1950, in violation of § 145 (b) of the Internal Revenue Code, 26 U. S. C. § 145 (b).[1] The ap-

798 pellant was sentenced to concurrent terms of imprisonment of two years on each count and fined $5,000. Exe-

[1] "§ 145. *Penalties*

* * * * * * *

"(b) *Failure to collect and pay over tax, or attempt to defeat or evade tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

cution of sentence was stayed pending appeal. Although the nearly 800 page record before us contains voluminous facts that concern the many contentions made by appellant, as is the usual situation in such cases, we shall set forth only those facts that we believe pertinent to the disposition of this case.

The appellant was a member of the Police Department of Worcester, Massachusetts, from January 1923 to December 1951. The appellant's assignments as a police officer can be best presented by the chart below:

Jan. 2, 1923, to June 1, 1923	Precinct 1—night duty.
June 1, 1923, to Feb. 15, 1924	Injured.
Feb. 15, 1924, to Dec. 4, 1931	Plainclothesman on headquarters squad.[2]
Dec. 4, 1931, to Apr. 20, 1932	Precinct 1—night duty.
Apr. 20, 1932, to Mar. 1, 1933	Plainclothesman on headquarters squad.
Mar. 1, 1933, to Jan 15, 1934.	Precinct 1—night duty.
Jan. 15, 1934, to Jan. 20, 1936	Plainclothesman on headquarters squad.
Jan. 20, 1936, to Jan. 10, 1938	Precinct 1—night duty.
Jan. 10, 1938, to Sept. 11, 1939	Plainclothesman on headquarters squad.
Sept. 11, 1939, to Jan. 6, 1940	Precinct 1—night duty (promoted to sergeant).
Jan. 6, 1940, to June 1, 1943	Headquarters squad, sergeant in charge.
Night patrolman.	
Plainclothesman on vice and liquor squad.	
June 1, 1943 to June 1, 1947	Personnel officer.[3]
June 1, 1947 to Oct. 1, 1949	License Board investigator.[4]
Sept. 8, 1947	Promoted to lieutenant.
Oct. 1, 1949 to Dec. 31, 1951	Personnel officer.

Appellant's salary for the years 1946, 1947, 1948, 1949, and 1950 was $2,850, $3,300, $3,300 $4,080, $4,080, respectively. From 1937 to 1945 he earned from $2,100 to $2,850 a year. Although the payroll records for the years prior to 1937 had been destroyed and could not be produced, presumably he did not earn more than $2,100 a year during that period. Appellant's wife from 1933 to 1951 was a housewife with no source of money except that which the appellant gave to her. She

[2] Duties of the headquarters squad were the same as the vice squad, i. e., to suppress all forms of vice.

[3] Duties of this office were to inspect the physical plant and personnel and to see that patrolmen carried out their assignments.

[4] Duties of this office were to investigate license applications for hackney carriages, taxi drivers, gas stations and parking lots.

has never at any time inherited or received as a gift any money or other valuables.

The Government established the above facts at the trial in attempting to prove that appellant had filed false and fraudulent joint tax returns, for himself and his wife, for the years 1946 to 1950, inclusive. The theory of the Government's case was that the joint net worth of the appellant and his wife was greater at the end than at the beginning of each year in issue, and that the source of their increased net worth was taxable income which exceeded that reported in their joint tax returns.

In this connection the Government produced in evidence the joint returns of the appellant and his wife for the prosecution years which reflected total income of $3,232.62, $3,539.66, $4,549.28, $5,004.91 and $6,701.75 for the years 1946 to 1950, respectively. In contrast to the reported income the Government presented evidence tending to establish that
on December 31, 1945 appellant had a net worth
800 of $61,080.73 and that on December 31, 1950, appellant had an accumulated net worth of $149,504. Appellant's net worth increases and receipts during the prosecution years, based on records of purchases of annuities, automobiles, land and securities by appellant and his wife, were $27,265.38, $9,991.64, $5,533.22, $9,599.72, and $36,033.31 for the years 1946 through 1950, respectively. Moreover, the Government established that prior to the indictment years there was evidence of receipts by appellant far in excess of the salary paid him. There was no evidence that appellant had ever received any gifts or devises other than an one-half interest in a house which will be discussed below. Since, after a careful study of the record, we believe that the figures concerning opening net worth and increases in net worth during the prosecution years were sufficiently grounded in the evidence, it is not necessary to set forth in detail the many items of proof with respect to them.

As to the likely source of the appellant's net worth increases during the indictment years, the Government stated in its bill of particulars as follows:

"1. The likely source of unreported income of the defendant is moneys received by the defendant as an individual from many persons engaged in various illegal activities for the performance by the defendant of his official duties as a member

of the Worcester Police Department, for the nonperformance by the defendant of his official duties as a member of the Worcester Police Department, and for the performance by the defendant as a member of the Worcester Police Department of services rendered to such persons in connection with such illegal activities."

The Government's theory, plainly stated, was that appellant throughout his career as a police officer had taken graft. The only evidence in support of this theory was that,

during the period when the case was under investiga-
801 tion by the Treasury Department, the appellant, through an attorney who represented him only prior to trial, on four instances admitted to Government agents that appellant had taken graft during the preindictment years.

This evidence was admitted over the appellant's objections and was relied upon by the prosecution to establish the source from which it was likely that the appellant derived his unreported income during the prosecution years.

The record discloses that on November 27, 1951, appellant's attorney arranged for the opening by the appellant of his safe deposit box in a Westerly, Rhode Island bank, so that agents Hurst and Calatrello might examine its contents. The agents testified in substance that while Hurst was dictating an inventory of the contents to Calatrello, Hurst turned to the appellant and asked him "the source of the funds that were used to acquire the various assets." The appellant replied that "it came from many different people at different times * * * many years ago," whereupon appellant's attorney interrupted and stated that the appellant got the funds during prohibition days "from letting liquor trucks roll" through Worcester. The appellant then "picked up the conversation again and said he got the funds in the nature of a gift and therefore he didn't report it or he didn't think it was taxable."

Moreover, prosecution witnesses testified that on three occasions appellant's attorney, in the absence of the appellant, told them that the money spent by the appellant from 1946 to 1950 came from graft taken by appellant during prohibition days and while he was on the vice squad between 1933 and 1943. These occasions were as follows: (a) on an unspecified date in November or December 1951 to Hurst in his office; (b) on January 24, 1952, to Hurst in his office; and (c) on May 20, 1952, to Hurst and attorney Isber of the Treasury's District

Counsel's office in Isber's office at a conference during
802 which appellant's attorney was endeavoring to persuade
Isber to recommend against criminal prosecution of the appellant.

Government witnesses also testified that during the conference of May 20, 1952, with Isber, appellant's attorney stated that in February 1949 the appellant obtained "X dollars after the death of his father, who had saved a lot of cash" from a partnership interest in a tavern which was engaged in the illegal sales of liquor. F. Joseph Donohue, Register of Probate for Worcester County, testified that the petition for probate of the will and the will itself of Pilade Massei, appellant's father, had been duly filed and allowed but no inventory or account had ever been filed. John Bianchi, executor of the will, testified that he had filed no inventory and that the only asset of the estate which he could find was a three tenement house in Worcester. It was established that the appellant in 1949 had received only an one-half interest in the three tenement house from his father's estate.

The trial judge, before admitting the agents' testimony concerning admissions made by appellant's attorney, held voir dire hearings on the attorney's authority to make such admissions for appellant. At these hearings testimony concerning the Treasury Regulations governing powers of attorney and appellant's attorney's statements was heard. Specifically, the Government presented evidence of many letters between appellant's attorney and agent Hurst showing that the attorney had acquired from appellant and had produced whatever information concerning appellant's finances that Hurst requested during the period of investigation before criminal prosecution was decided upon. The evidence revealed that the appellant through his attorney had cooperated fully with the investigating agents. However, the power of attorney that was supposed to have been given by appellant, as provided for
803 by the Treasury Regulations, could not be produced, although there was substantial evidence that such a power of attorney had been filed.

After the voir dire the district court ruled that the statements of appellant's attorney would be admitted into evidence but "that the ultimate question of the authority of the agent to make admissions binding upon this defendant

will be for the jury, under instructions which the Court will consider proper at the appropriate time."

Due to this ruling the appellant endeavored to establish the atmosphere and context in which his attorney's statements had been made. The appellant took the position and offered evidence to show that, at the conferences with Hurst and Isber, his attorney was speaking argumentatively and hypothetically with no intention of binding his client. For example, the appellant offered testimony that his attorney cited decisions to Isber and that he had no personal knowledge of appellant's activities during prohibition and the time he was on the vice squad. The district court, at first, refused to allow such testimony and had it stricken when it was recited, stating that "anything that is a contention I am going to exclude, * * * I am not going to have anything go in that is a contention or an argument whether it's by the Government or the defendant." Later in the trial, however, the court, without stating the reason for its change of mind, did allow such testimony. Indeed, the attorney, appellant's only witness, was permitted to testify at length that his entire presentation to Isber was a legal argument based upon hypotheses and assumptions. And in its charge the court clearly left it to the jury to determine if the attorney's remarks had been statements of fact or hypotheses, specifically stating "you may not consider them against the defendant, * * * if you find that the alleged statements of fact * * * were made as hypotheses."

804 The trial judge further charged, concerning the statements of graft taking, as follows:

"Now, if you find that the admissions alleged were made, you have to go a step further. Then it becomes your duty to determine if a source is established, because that is what is necessary. Now, I say this advisedly: the source which the Government alleges—and if I am wrong I desire to be corrected—is illegal payments by persons unknown to induce this defendant Massei to perform acts of misfeasance, malfeasance and nonfeasance, to do something that was improper, that was wrong, and that with particular application to the position which he held, a position of a fiduciary nature, a position of a police officer, a member of the police force of the City of Worcester. There is a presumption, and I am going to instruct you on this, there is a presumption that a police officer does

not receive illegal payments. That is a very, very efficacious presumption, and it would apply to other men holding offices of trust and confidence, but if you find that that presumption had been rebutted, and rebutted by the test that I have given you, has been rebutted, for example, by the admissions made by the defendant, so far as the presumption applies to him, then I charge you that you may infer, having in mind his continued position in the police department, you may infer that continued payments of this sort were a likely source of the increase in net worth reflected by the Government's evidence, if you find that they showed it."

The appellant objected to the admissibility of his attorney's statements on the grounds of relevancy and materiality, among others, and at the conclusion of the evidence generally
805 moved to strike the testimony concerning the statements made by his attorney on the ground that they were not corroborated by the evidence.

At the close of the Government's case the appellant moved for a verdict of acquittal on the ground "that the evidence on each count is not legally sufficient to support a conviction." The court refused to pass on the motion in view of the fact appellant had not rested his case. At the close of all the evidence appellant renewed his motion for a verdict of acquittal, stating specifically to the court, among other things, that as to likely source the Government had presented only "these alleged admissions by [appellant's attorney] talking about the defendant's activities back in prohibition days, and also the defendant's activities back when he was on the Vice Squad—all prior to 1943. There is absolutely nothing, if your Honor please, in this case, by way of evidence bearing on the years in question—absolutely nothing."

On appeal the appellant presents as contentions, among others, that the alleged admissions made by him through his attorney were unauthorized, irrelevant and uncorroborated. Further, he argues that without these admissions the Government failed to prove a likely source of the appellant's increases in net worth. Therefore, appellant contends the district court should have granted his motion for a verdict of acquittal made at the close of all the evidence.

The Government, on the other hand, urges that the question of whether appellant's attorney had the authority to make the statements in issue properly was left to the jury. As to

relevancy, it urges that the statements were relevant as to the establishment of the starting net worth, as to likely source and as ending to prove previous tax evasions, which the Government claims, would show fraudulent intent on the part of appellant to evade his taxes during the prosecution years. Moreover, the Government seems to maintain that the admissions of graft taking were fully corroborated by independent evidence that appellant remained on the police force through the indictment years and that appellant had net worth increases that cannot be explained in any other way.

806

After a careful consideration of the record and the briefs, we are of the opinion that the judgment of conviction cannot stand mainly on the ground that the admissions of appellant through his attorney, whether they were properly admissible or not, as the only evidence of likely source, were not corroborated by independent evidence. In view of this the trial judge erred in not striking out the admissions and in not granting the appellant's motion for a verdict of acquittal. Although we believe the crucial issue in this case is that dealing with corroboration of the aforementioned admissions, we shall also touch upon other questions involved therein.

The Supreme Court in Holland v. United States, 348 U. S. 121, 125 (1954) stated "that the Government deems the net worth method useful in the enforcement of the criminal sanctions of our income tax laws. Nevertheless, careful study indicates that it is so fraught with danger for the innocent that the courts must closely scrutinize its use." Further, the Court [at p. 129] declared that "Appellate courts should review the cases, bearing constantly in mind the difficulties that arise when circumstantial evidence as to guilt is the chief weapon of a method that is itself only an approximation." After these general cautionary remarks, the Court set forth certain safeguards for net worth cases. In this connection it was stated [at pp. 137–138] that "Increases in net worth, standing alone, cannot be assumed to be attributable to currently taxable income. But proof of a likely source, from which the jury could reasonably find that the net worth increases sprang, is sufficient." Recently, in reviewing a civil tax deficiency case, we interpreted the above language as meaning that proof of a likely source is "an indispensable element of the net worth method in any of its applicants." Thomas v.

807

Commissioner of Internal Revenue, 232 F.2d 520, 526 (1 Cir. 1956).

Generally, likely source has been proved in net worth cases in two ways. Where the taxpayer disclosed ownership of a business it was considered sufficient proof of likely source for the Government to establish that the disclosed business was capable of producing much more income than was reported. Holland v. United States, supra. Also, where the taxpayer was an owner of an undisclosed business, proof that the undisclosed business was capable of producing income was considered sufficient. United States v. Johnson, 319 U. S. 503 (1943).

But absent an income producing business, proof of likely source has been of a different kind. For example, in United States v. Chapman, 168 F. 2d 997, 999 (7 Cir. 1948), cert. denied, 335 U. S. 853 (1948), where the bill of particulars in effect stated "that the source of the 'other income' was the illegal sale of meat at overceiling prices," the Government introduced the evidence of seven meat peddlers all of whom testified that during the year 1943 they paid overceiling prices paying the excess in currency either to Chapman, the defendant, or his agents. Likewise, in United States v. Skidmore, 123 F. 2d 604 (7 Cir. 1941), cert. denied, 315 U. S. 800 (1942), where the theory of the Government apparently was that defendant had received unreported income from payments for "protection", there was some evidence of payments made to the defendant by bookmakers.

And in a recent case, which bears a striking similarity to the case at hand, where the Government's theory was that the unreported taxable income was graft received by the defendant for nonperformance of his duties as a policeman and as a member of the vice squad, "[a]lthough there was no direct evi-
808 dence that the defendant ever received a bribe, the evidence did disclose that he had 'opportunities' flowing from his position in charge of the investigation of vice." United States v. Ford, 237 F. 2d 57 (2 Cir. 1956). The evidence in the Ford case as to "opportunities" of the defendant to receive bribes, though seemingly not essential to the majority's holding, disclosed that there was wide open gambling in Rochester, New York when the defendant was on the vice squad; that the defendant did not take any action against one selling policy slips, although he knew about it; that statistics of gambling cases disposed of in the City Court of Rochester indicated an

upswing in prosecution of gambling after other officers had been assigned to the squad; and that the defendant was on friendly terms with a professional gambler. See also Ford v. United States, 233 F. 2d 56 (5 Cir. 1956), cert. denied, 352 U. S. 833 (1956).

In the instant case the only direct evidence of likely source were the admissions made by appellant through his attorney in which the latter stated that appellant had taken graft during preindictment years. Primarily we must consider, insofar as necessary, the appellant's contention that these statements were inadmissible.

First we turn to the three instances when appellant's attorney stated to the Government agents, in the absence of appellant, that appellant had taken graft. "The general rule is that, upon the trial of an accused person, evidence of another offense, wholly independent of the one charged, is inadmissible." Bracey v. United States, 142 F. 2d 85, 87 (D. C. Cir. 1944), cert. denied, 322 U. S. 762 (1944). In this connection it was stated in Railton v. United States, 127 F. 2d 691, 693 (5 Cir. 1942):

"* * * It is logical to conclude, and very apt to be concluded, that because a man was dishonest once he will steal again. It is certainly 'more probable' that a crooked official
did steal than if he was an upright one. Yet our law for-
809 bids these very premises. It cannot be shown that the
accused has committed other similar crimes to show that it is probable he committed the one charged. * * *"

It follows from the above cases, we believe, that it was error for the district court to admit these admissions into evidence and to charge the jury, as it did, that from the admission of graft taking during preindictment years it could infer appellant continued taking graft during the indictment years, and thus find likely source. It is not a legally permissible inference, absent some reasonable connection, that appellant having committed a criminal act in the past, continued to do so. Such an inference, in essence, would fly in the face of the above quoted rule that "[i]t cannot be shown that the accused has committed other similar crimes to show that it is probable he committed the one charged." *Railton* v. *United States,* supra, at 693. See also Lovely v. United States, 169 F. 2d 386 (4 Cir. 1948); Sang Soon Sur v. United States, 167 F. 2d 431 (9 Cir. 1948); Bracey v. United States, supra.

Moreover, we do not believe that the admissions of graft taking prior to 1943, when appellant, as a patrolman during prohibition and as a member and head of the vice squad at a later date, had opportunities open to him for graft, were connected with the prosecution years, since there was no evidence whatsoever showing that these opportunities continued during the indictment years when appellant performed totally different duties as personnel officer and license board investigator. See United States v. Adonis, 221 F. 2d 717 (3 Cir. 1955). Nor do we think that these admissions, due to the remoteness in time from the indictment years and due to the change in appellant's duties as a police officer, are relevant as to likely source, as tending to establish a common design or plan, which seems to have been the situation in Green v. United States, 176 F. 2d 541 (1 Cir. 1949).

810 However, it might be contended, aside from the issue of the authority of appellant's attorney to make such statements,[5] that even though the admissions might not be relevant as to likely source, they would be admissible if they are relevant as to other elements of the crime, specifically opening net worth and intent[6] to evade taxes. See Green v. United States, supra. Although this might be so, it is significant that the lower court instructed the jury to consider the statements of graft taking only as to likely source. In this connection the court charged:

"Now also, with respect to [appellant], there has been some testimony as to his past conduct. Please bear in mind that that evidence was allowed in only as it has some bearing upon the issue of the source of the defendant's income and as bear-

[5] We note in passing that "[w]hether there was sufficient proof of the agency to warrant the admission of the acts and declarations of the agent in evidence, was a preliminary question for the court to determine." Cliquot's Champagne, 70 U. S. 114, 140 (1865)). However, the district court here submitted the question of agency to the jury only after holding voir dire hearings and presumably it would not have done so if it had not been convinced that there was sufficient proof of the agency. Under such circumstances we do not believe it was prejudicial error for the court to leave the question to the jury.

[6] The Government states that the tax return history of appellant prior to the indictment years shows very little other income besides his police salary. Further, it urges that from the admission of receipt of graft previous to the indictment a jury could find that in the preindictment years Massei evaded his income taxes. Previous evasions constitute relevant evidence of present intent to evade. See Mitchell v. United States, 213 F. 2d 951 (9 Cir. 1954), cert. denied, 348 U. S. 912 (1955); United States v. Sullivan, 98 F. 2d 79 (2 Cir. 1938); Tinkoff v. United States, 86 F. 2d 868 (7 Cir. 1936), cert. denied, 301 U. S. 689 (1937).

ing upon the charge before this court. You are to consider it only on that issue alone."

Furthermore, we are of the opinion that even if the court had charged the jury to consider the statements of graft
811 taking on the issues of opening net worth and intent to evade taxes, it would have been error. As to opening net worth, the Government certainly did not need these declarations of graft taking to prove appellant had sizeable holdings on December 31, 1945, by reason of the fact that appellant contended, as appears from all events leading up to the trial, that he had even more money than the Government gave him credit for on that date. As to the intent to evade taxes, assuming prior evasions were relevant, we do not believe that the circumstances surrounding the prior evasions would be relevant. The jury could have been informed of the prior evasions, if any, without mention of the graft taking. Since it was the prior evasions, in themselves, that had probative value as to intent to evade and not the graft taking, the admissibility of such prejudicial evidence would not have been warranted on this issue.

Therefore, the only purpose, as manifested by the court's charge, that these admissions could have served would be to prove that appellant continued taking graft during the indictment years. This, as we have discussed above, is not a permissible inference. To hold otherwise, in our considered judgment, would be to run the danger of convicting the appellant for the taking of graft some years before the indictment when the indictment charges him with income tax evasion.

Our views on admissibility, as expressed above, also apply to the statement made by the attorney, in appellant's presence, concerning graft taking by appellant during prohibition, at the Westerly, Rhode Island bank on November 27, 1951. In fact, this admission in referring only to graft taking during prohibition was even farther removed in time and circumstance from the indictment years than the others.

But, notwithstanding the issue of admissibility, the aforementioned admissions should not have gone to the jury
812 as part of the Government's case since they were not corroborated. In Smith v. United States, 348 U. S. 147 (1954), where the defendant had made extrajudicial admissions concerning his net worth which the Government presented as part of its case, the Supreme Court held that an admission

embracing a vital element of the crime made after the fact to an investigating official must be corroborated by sufficient independent evidence. In so holding the Court stated at page 155:

"The negative implications of petitioner's opening net worth admission formed the cornerstone of the Government's theory of guilt. Without proof that assets on hand at the beginning of the prosecution period did not account for the alleged net worth increases, the Government could not succeed. * * * An admission which assumes this importance in the presentation of the prosecution's case should not go uncorroborated, and this is true whether we consider the statement an admission of one of the formal 'elements' of the crime or of a fact subsidiary to the proof of these 'elements.' It is the practical relation of the statement to the Government's case which is crucial, not its theoretical relation to the definition of the offense."

Similarly, we believe that in the case before us the statements of graft taking, made by appellant's attorney, "formed the cornerstone of the Government's theory of guilt," since without them there would be no proof of likely source. In the Smith case, the Court, after reviewing evidence, independent of the admissions, dealing with the defendant's assets, was satisfied that there was sufficient evidence corroborating the defendant's admissions as to net worth. Likewise, in United States v. Calderon, 348 U. S. 160 (1954), where the admissions of the defendant also concerned net worth, the Court found

corroboration.

813 the Adonis case, we believe that case is inapplicabl.

ture of the evidence reviewed by the Supreme Court in the above two cases in deciding the issue of corroboration, in its brief has set forth in great detail its independent evidence as to the appellant's assets and net worth increases. Then it urges that just as that type of evidence was held to be sufficient corroboration of the admissions in Smith and Calderon, it should be so held here. As additional evidence of corroboration it points to the fact that appellant was proved to have been a police officer as stated in his admissions.

We cannot agree with the Government on this point. We think that independent evidence of the defendants' expenditures, assets and bookkeeping techniques was held sufficient corroboration in Smith and Calderon, either as bolstering the admissions or as evidence tending to establish the crime inde-

pendent of the admissions, by reason of the fact that the admissions in those cases concerned the net worth of the defendants. Here the admissions of graft as relating to likely source disclosed from where appellant's net worth increases likely came. Only independent evidence of some actual graft taking or, at least, opportunity for graft taking could serve as sufficient corroboration of such admissions. Evidence of unexplained net worth increases does not either bolster the admissions of likely source or establish this element of the crime independent of the admissions, for that evidence, independent of the admissions, does not tend to prove from where the net worth increases likely issued.

Nor does the fact that the Government, in addition, independently proved that appellant was a member of the police force during prohibition and a member of the vice squad prior to 1943 provide the necessary corroboration for the preindictment years. And certainly independent proof that appellant remained on the police force during the indictment years
814 also falls short of the corroboration especially since the appellant during the the indictment years was performing duties different from those referred to in his admissions.

The Government had to present some evidence of actual graft taking or opportunity for such in order to establish the element of likely source independent of the admissions. Since it failed to do this, the district court should have stricken the evidence concerning the admissions from the record. And since without the admissions there was no evidence of likely source in the record, it should have granted appellant's motion for a verdict of acquittal.

Finally, we must turn to the Government's contention, which the district court adopted in its charge, that even without proof of likely source the appellant could be convicted under the indictment for the year 1949 under the holding of United States v. Adonis, supra. That case seems to hold that where a defendant has made a "calculated misrepresentation designed to conceal current income" [at p. 720] proof of likely source is not necessary. The Government would have us look upon the statement of appellant's attorney, made on May 20, 1952 before Government attorney Isber, that appellant obtained "X dollars" from his father's estate in 1949, as such a "calculated misrepresentation."

Here, too, the Government's contention must fall. In the Adonis case the defendant had previously misrepresented the source of his income in a judicial proceeding so as to carefully explain away most all his income for the year under indictment. In the case before us appellant's attorney while urging against criminal prosecution presented the appellant's inheritance without even stating an amount. Since we do not believe this was a "calculated misrepresentation" within the meaning of the Adonis case, we believe that case is inapplicable.

815 While we have mentioned the Adonis case, above, and the Second Circuit Ford case, earlier in this opinion, we do not mean to infer that we either approve or disapprove of the exceptions to the necessity of proving likely source that these holdings seem to have established. Suffice it to say that we believe that constitutional guarantees of a defendant must be as zealously guarded in tax evasion cases based upon the net worth theory as they are in other criminal cases. Inroads upon the enunciated net worth safeguards can only result in forcing the accused to prove his innocence, an inherent danger of the net worth theory from inception.

A judgment will be entered vacating the judgment of the District Court, setting aside the verdict, and remanding the case for further proceedings not inconsistent with this opinion.

WOODBURY, Circuit Judge, (Dissenting). It seems to me that proof of position on a municipal police force, where everyone knows opportunities for graft exist, is as much proof of a likely source of unreported income as is proof of ownership of a business capable of producing income. Cf. Holland v. United States, 348 U. S. 121 (1954). And this is especially true where there is evidence, which I think admissible, indicating that a position on the police force had been a bountiful source of unreported income in the form of graft in prior years.

The admissions made by the appellant's attorney were, I think, clearly within the scope of his authority to speak for the appellant. I cannot recognize the legitimacy of such a "special authority" as that contended by the appellant, whereby the authority for the admission depends on facts subse-

816 quent to the utterance, i. e., if the admission works out to the advantage of the principal it was authorized, but if ultimately disadvantage results, there was no authority. And the fact that the admissions constituted evidence of the commission of a crime other than the one for which the appel-

lant was on trial does not necessarily render the admissions inadmissible. Relevancy is the test of admissibility of this kind of evidence. That is to say, the degree of probative force as weighed against the possibility of undue prejudice determines admissibility. Irrelevant testimony of the commission of some crime other than the one with which a defendant is charged is so highly prejudicial that it is not admissible for that reason.* But otherwise relevant testimony is not rendered inadmissible only because of its tendency to show the commission of another crime. Green v. United States, 176 F. 2d 541, 543 (C. A. 1, 1949). Whether the prejudicial tendency of relevant evidence of the commission of some other crime outweighs its probative value in the case on trial is a matter committed to the discretion of the trial court. Here the evidence of prior graft as a police officer is so logically relevant to prove a continuing source of unreported income that I think the court not only did not abuse its discretion in admitting the evidence but was quite right in doing so. It seems to me that proof of substantial increases in net worth during the prosecution years, coupled with evidence of a thorough but fruitless search for a non-taxable source for those increases, served the dual purpose of providing adequate corroboration for the admissions of graft taking during preprosecution years and in addition warrants
817 the inference that the appellant continued to take graft during the years covered by the indictment. The fact that the appellant's assignments as a police officer during the prosecution years were different from his previous assignments does not indicate that he did not take graft during the indictment years. I think there can be little doubt that opportunities for graft exist whatever a police officer's assignments or rank may be. Indeed, with higher rank the opportunities probably would increase. I would affirm on the general line of reasoning followed by Judge Hinks in United States v. Ford, 237 F. 2d 57 (C. A. 2, 1956).

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* Evidence of the commission of another unrelated crime can not be admitted merely to prove the defendant a "bad man," and therefore more likely to have committed the crime alleged than a "good man" with a clean record. While such evidence may in some situations be of some remote relevance, the probability of undue prejudice to the defendant therefrom so far outweighs its probative force with respect to the particular crime alleged that it is universally excluded.

818 In United States Court of Appeals
for the First Circuit

Judgment

Entered February 27, 1957

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is vacated, the verdict is set aside and the case is remanded for further proceedings not inconsistent with the opinion passed down this day.

By the Court:

(S) ROGER A. STINCHFIELD,
Clerk.

Thereafter, on March 15, 1957, mandate issued and the original papers were returned to the District Court.

819 [Clerk's certificate to foregoing transcript omitted in printing.]

820 Supreme Court of the United States

No. —, October Term, 1956

UNITED STATES OF AMERICA, PETITIONER

v.

WILLIAM V. MASSEI

Order extending time to file petition for writ of certiorari

Upon consideration of the application of counsel for petitioner,

It is ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including April 8, 1957.

FELIX FRANKFURTER,
Associate Justice of the Supreme Court of the United States.

Dated this twenty-ninth day of March 1957.

822 Supreme Court of the United States

No. 885, October Term, 1956

[Title omitted.]

Order allowing certiorari

Filed May 20, 1957

The petition herein for a writ of certiorari to the United States Court of Appeals for the First Circuit is granted. The case is transferred to the summary calendar and assigned for argument immediately following No. 794.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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No. 598

In the Supreme Court of the United States

OCTOBER TERM, 1956

UNITED STATES OF AMERICA, PETITIONER

v.

WILLIAM V. MASSEI

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

J. LEE RANKIN,
Solicitor General,
CHARLES K. RICE,
Assistant Attorney General,
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INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	3
Reasons for granting the writ	9
Conclusion	13
Appendix	14

CITATIONS

Cases:

United States v. *Ford*, 237 F. 2d 57, certiorari granted, February 25, 1957 (No. 794)	9, 12
Hasson v. *Commissioner*, 239 F. 2d 778	9
Holland v. *United States*, 348 U. S. 121	9
Smith v. *United States*, 348 U. S. 147	11
Thomas v. *Commissioner*, 232 F. 2d 520	9
United States v. *Adonis*, 221 F. 2d 717	9, 10, 11
United States v. *Calderon*, 348 U. S. 160	11

Statute:

Internal Revenue Code of 1939, Sec. 145 (b) (26 U. S. C. 1952 ed., Sec. 145 (b))	2

422478—57——1

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. ——

UNITED STATES OF AMERICA, PETITIONER

v.

WILLIAM V. MASSEI

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Appeals reversing respondent's conviction under Section 145 (b) of the Internal Revenue Code of 1939.

OPINION BELOW

The opinion of the Court of Appeals (App., *infra*, pp. 14–35) is not yet officially reported.

JURISDICTION

The judgment of the Court of Appeals (App., *infra*, p. 35) was entered on February 27, 1957. On March 29, 1957, by order of Mr. Justice Frankfurter (App., *infra*, p. 36), the time for filing this petition was extended to and including April 8, 1957. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254.

QUESTIONS PRESENTED

1. Whether the court below erred in holding that, in a tax evasion prosecution based on the net-worth method, proof of a likely source of the defendant's net-worth increases is an indispensable element of the Government's case.

2. Whether the court below erred in holding that extrajudicial admissions by respondent, a public official, that he had taken graft in pre-indictment years were (*a*) uncorroborated and (*b*) irrelevant.

STATUTE INVOLVED

Internal Revenue Code of 1939:

SEC. 145. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U. S. C. 1952 ed., Sec. 145.)

STATEMENT

On February 16, 1953, an indictment in five counts was returned against respondent in the United States District Court for the District of Massachusetts charging willful attempted evasion of income tax for each of the years 1946 through 1950, in violation of Section 145 (b) of the Internal Revenue Code of 1939. The indictment alleged unreported income and tax due and owing for the five year period in the aggregate amounts of $75,000, and $26,000, respectively. (R. 1, 4–8.) At the trial before a jury, the Government's case was based upon the net worth method of proof.

The evidence adduced by the Government was largely undisputed and may be summarized, briefly, as follows:

Respondent was a member of the police department of the City of Worcester, Massachusetts, from 1923 until his retirement in 1951. He was promoted to sergeant in 1940 and lieutenant in 1947. Prior to 1940, his principal duty assignments were with the motorcycle patrol and the vice squad. From 1940 until June 1943, he was in charge of the vice squad. Thereafter, he served as personnel officer and as license board officer. One of his duties as personnel officer was to see that patrolmen carried out their assignments. As license board officer, he investigated and passed upon all applications for licenses to operate taxi cabs, gas stations, and parking lots. (R. 200–207.) Prior to 1946, respondent's salary as a policeman did not exceed $2,550 a year, and during the indictment years, it ranged from $2,850 in 1946 to $4,080 in 1950. (R. 221–224.)

From 1916 until his appointment as a policeman in 1923, respondent's earnings did not exceed $2,750 a year. (R. 457.) He did not receive any gifts or inheritances at any time, with the exception of a one-half interest in a house which he inherited from his father in 1949. (R. 252–253, 278–279, 453.) Respondent was married in 1933. (R. 253–254.) His wife had no outside employment (R. 254), and no independent income, and she never received any gifts or inheritances (R. 456). Respondent filed an income tax return for 1920 showing a tax due of $19.79. (R. 113.) There was no record of a return filed by him for any of the years 1921 through 1939 (R. 118),[1] and for the years 1940 through 1944 he reported a tax liability in the amount of $24.30, $126.48, $304.03, $320.78, and $174.60, respectively (R. 116–117). For the year 1945, he reported an income of $6,009, including, in addition to his salary, dividends, interest, and other income totaling $2,985, and a tax liability of $1,122. (R. 99–100.)

In years prior to 1946, respondent and his wife deposited in banks and expended sums greatly in excess of his salary and declared available resources. For example, in 1945 respondent purchased two paid up retirement annuity contracts from the John Hancock Mutual Life Insurance Company at a total cost of $27,668. (R. 258–265.) As of the beginning of the prosecution period, respondent and his wife had accumulated some $61,000, consisting of cash in banks, United States saving bonds, the aforementioned annuity contracts, and an automobile. (R. 497–500.)

[1] Prior to 1939, his salary as a municipal employee was exempt from the federal income tax.

During the prosecution years, the net worth of respondent and his wife increased from $61,000 to $149,000. (R. 516.) The increases in net worth reflected cash expenditures totaling $75,000 for the purchase of annuity policies, securities, land, and automobiles and for the construction of a house. These cash expenditures could not be traced by the agent to any source. (R. 514–516.) The assets and liabilities included in the net worth statement were established by third party testimony and records and were not disputed by respondent. (R. 528–529, 696.) He claimed that the net worth increases were attributable to a cash hoard accumulated through graft prior to 1945 and not credited by the prosecution. (R. 460, 473, 483–484, 488–489, 495, 579–581, 621–641.)

Special Agent Hurst testified that, based upon the increases in net worth plus nondeductible expenditures disclosed by the evidence, respondent's true net income for the years 1946 through 1950 was $29,658, $11,583, $7,967, $11,127, and $37,199, respectively, whereas he reported net income of $3,232, $3,539, $4,549, $4,504, and $6,031, respectively (R. 502, 504, 507, 509–510, 512). Revenue Agent Calatrello testified that respondent's correct tax liability for the same years was $11,474, $2,538, $1,035, $1,879, and $11,251, respectively, whereas he reported a tax due of $361, $416, $477, $549, and $862, respectively (R. 598–599).

During the course of the investigation and while his case was pending in the Treasury Department, respondent was represented by counsel. His attorney, W. Arthur Garrity, secured from respondent and submitted to the agents substantially all of the in-

formation and data requested by them. (R. 420–495, 534.) The revenue agents had direct contact with respondent on only one occasion when the latter opened his safe deposit box in the presence of Agents Hurst and Calatrello and his attorney, Garrity. (R. 553.) On that occasion, Agent Hurst asked respondent for an explanation of the source of the funds which he used to acquire the various assets. Respondent replied that "it came from many different people at different times * * * many years ago," whereupon respondent's attorney interrupted the conversation and stated that Mr. Massei "got these funds during prohibition days" "from letting liquor trucks roll down Shrewsbury Street." Respondent then picked up the conversation again and said that "he got the funds in the nature of a gift and therefore he didn't report it or he didn't think it was taxable." (R. 436–437, 600.) On two other occasions during the course of the investigation, Garrity stated to Agent Hurst that respondent had taken graft when he was a motorcycle patrolman during prohibition days and when he was a member and head of the vice squad. (R. 471, 486–487.) Similar statements were made by Garrity at a conference in the office of the Regional Counsel, Internal Revenue Service. (R. 573, 579–581.) The admissions of graft taking in pre-indictment years were made in an effort to convince the revenue agents that the net worth increases disclosed by the investigation were attributable to a cash hoard which respondent had accumulated prior to 1945. (R. 471, 473, 483–484, 488–489, 495, 579–581, 590.)

The evidence relating to the admissions was received over respondent's objection and after a *voir dire* hearing. (R. 306–370.) Respondent objected to the evidence on the grounds that his attorney was not authorized to make the admissions and that, in any event, the evidence was irrelevant. In admitting the evidence, the court left for the jury, under guiding instructions, the question of the authority of the attorney to make admissions binding upon respondent. (R. 370.)

Respondent did not take the stand at the trial. The only witness called by the defense was respondent's former attorney, Garrity, who testified to his version of the conversations with the revenue agents in the course of which the admissions were made. (R. 622–673.) At the close of the evidence, respondent moved to strike the testimony concerning his extra-judicial admissions, with the exception of the testimony recounting conversations in his presence, on the grounds that the evidence was incompetent and irrelevant, and, in addition, that the admissions were uncorroborated. (R. 675.) The motion to strike was denied. (R. 676.)

Respondent moved for judgment of acquittal on the grounds that there was a fatal deficiency in the proofs in that the prosecution failed to establish by direct evidence a likely source to which the net worth increases could be attributed. (R. 679–694.)

The court charged the jury, in part, that the prosecution had the burden of proving a likely source from which the jury could infer that the net worth increases

sprang; that the prosecution alleges that the source was graft; that there is a presumption that a police officer does not receive illegal payments, but that the presumption is rebutted if the jury should find that defendant admitted taking graft in prior years; and that from the admission of graft taking in prior years the jury could infer that defendant continued taking graft during the indictment years, in view of his continued employment as a police officer, and thus find a likely source of unreported income to which the net worth increases could be attributed. (R. 731, 734.)

The jury returned a verdict of guilty as charged (R. 757–758), and respondent was sentenced to imprisonment for two years and fined $5,000 (R. 787). An appeal was taken to the Court of Appeals for the First Circuit, and on February 27, 1957, the Court of Appeals, in a two to one decision (Judge Woodbury dissenting), reversed the judgment of conviction.

The majority of the court below held (App., *infra*, pp. 23–27, 29–32) that proof of a likely source of unreported income is "an indispensable element" of a net worth case; that "the only direct evidence of likely source" consisted of the extra-judicial admissions of defendant that he had taken graft in pre-indictment years; and that these admissions, whether properly in evidence or not, were uncorroborated and, as such, could not serve as proof of an essential element of the Government's case. Accordingly, it held (App., *infra*, pp. 23, 32) that the evidence was not sufficient to take the case to the jury and that the motion for judgment of acquittal should have been granted. Also, with respect to proof of a likely source, the majority held (App.,

infra, pp. 26–29) that the evidence relating to the admissions was irrelevant and should therefore have been excluded; for the same reason, the majority held that the trial court erred in instructing the jury that, from admissions of graft-taking in prior years, it could infer that respondent took graft in the indictment years.

REASONS FOR GRANTING THE WRIT

1. The court below interpreted this Court's decision in *Holland* v. *United States*, 348 U. S. 121, 137–138, as laying down the requirement that proof of a likely source of unreported income is "an indispensable element" of the net worth method in any of its applications (App., *infra*, p. 24).[2] In so holding, the decision below is in direct conflict with the decision of the Court of Appeals for the Second Circuit in *United States* v. *Ford*, 237 F. 2d 57, certiorari granted, February 25, 1957 (No. 794), and the decision of the Court of Appeals for the Third Circuit in *United States* v. *Adonis*, 221 F. 2d 717.

As the court below recognized (App., *infra*, p. 25), this case "bears a striking similarity" to *United States* v. *Ford*, *supra*. In *Ford*, the Court of Appeals for the Second Circuit held (p. 65) that proof of a likely source "is not always an indispensable element in a net worth case". Accordingly, it concluded that, "without proof of a likely source", the Government's evidence was "fully adequate to support a finding that

[2] The court followed its earlier decision in *Thomas* v. *Commissioner*, 232 F. 2d 520, a civil fraud case. Compare *Hasson* v. *Commissioner*, 239 F. 2d 778 (C. A. 6), also a civil fraud case.

the defendant had substantial unreported receipts during the indictment years from some source", and that "all that was needed to complete a *prima facie* case was enough proof to negative the possibility that the unreported current receipts thus established were nontaxable." The latter requirement, in the Second Circuit's view, was satisfied by the evidence of the Government's "exhaustive investigation of the defendant's affairs" which "warranted an inference that he had no nontaxable income during the indictment years not credited to him" by the Government.[8]

Here, as the court below noted (App., *infra*, p. 17), the prosecution had firmly established respondent's opening net worth and the increases in his net worth in the prosecution years. It also presented evidence, of the same type presented in *Ford*, to negative nontaxable receipts by respondent in the prosecution years. Under the *Ford* holding, the Government had thus discharged its burden of proof and was entitled

[8] In *United States* v. *Adonis*, *supra*, the Court of Appeals for the Third Circuit affirmed a conviction for tax evasion based upon net worth proof although there was no evidence of a likely source of unreported income. In this connection, the court stated (p. 719) that the *Holland* decision "does not say that such proof of a likely source is the *only* additional evidence which will suffice to establish the government's case in a situation of this kind. And we do not believe that the Court intended such an implication. *For, in logic, other items of proof may have equal or greater probative value as circumstantial indication that the newly available funds were taxable income.*" (Emphasis added.) In *Adonis*, the court found (pp. 719–721) the additional evidence in proof that defendant had "wilfully fabricated an account of current non-taxable receipts" in an effort to explain away the net worth increases firmly imbedded in the evidence.

to have the case go to the jury. See also *United States* v. *Adonis, supra.* Under the decision below, however, the Government's burden could be discharged only by presenting, in addition, evidence affirmatively showing a likely source of current taxable unreported income.

To resolve this direct conflict among circuits on a question of continuing importance in the administration of the revenue laws, review by this Court is warranted.

2. Assuming *arguendo* that affirmative proof of a likely source is an indispensable element of the prosecution's case, we submit that such proof was adduced here. In addition to the other evidence negativing non-taxable receipts by respondent in the prosecution years, the prosecution presented evidence of admissions by respondent that he had taken graft as a policeman in pre-indictment years, and also showed that during the indictment years he continued to serve as a member and officer of the police department. The court below, however, held that the admissions were (*a*) uncorroborated and (*b*) irrelevant.

(*a*) The court stated (App., *infra,* p. 31) that "[o]nly *independent evidence of some actual graft taking* or, at least, opportunity for graft taking could serve as sufficient corroboration of such admissions." (Emphasis added.) In requiring that the admissions be corroborated by *direct* evidence, the court below misapplied this Court's decisions in *Smith* v. *United States,* 348 U. S. 147, and *United States* v. *Calderon,* 348 U. S. 160. On the other hand, if the court regarded "opportunity for graft-taking" as sufficient, there plainly was such evidence in the record.

Here, the admission to be corroborated was that respondent had taken graft in pre-indictment years. To corroborate this admission, the prosecution presented a large body of independent, albeit circumstantial, evidence which substantiated the verity of the admission. This evidence consisted of proof of defendant's duty assignments as a police officer and of his salary as such in the pre-indictment years; proof of deposits and expenditures made by him or his wife in amounts far in excess of available resources in those years; and proof of an opening net worth of some $60,000 which could not be accounted for out of savings, gifts, or inheritances. This evidence, similar in kind to that presented in *Smith* and *Calderon,* was ample to corroborate the admission that he had taken graft in the pre-indictment years.

(*b*) The court below also held that respondent's extra-judicial admissions of graft taken in pre-indictment years were irrelevant and without probative value in tending to show a likely source of income in the indictment years, despite respondent's continued employment and higher position in the police department. On this issue, too, the decision below is contrary to the views expressed by the Court of Appeals for the Second Circuit in *United States* v. *Ford,* 237 F. 2d 57, certiorari granted, February 25, 1957 (No. 794). In the *Ford* case, the court, in rejecting a contention similar to that advanced by respondent below, observed that (p. 66)—

> But we cannot indulge in the assumption that the defendant took graft in large amounts prior to the opening indictment date and shut

> our eyes to the likelihood that, if so, he continued to do so during the indictment years when the source remained available. If we assume, as we are now asked to do, that prior to 1947 the defendant actually profited through graft, by the defendant's own hypothesis accompanied by proof of opportunities for graft there existed a likely source of unreported taxable income during the indictment years which constituted adequate corroboration of the Government's proofs of additional taxable income, under the *Holland* doctrine.

It was a fair inference, which the jury could properly draw, that respondent's admissions of graft taking in prior years were related to the prosecution years, despite an intervening change in duty assignments.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted and the case set down for argument with the *Ford* case (No. 794), *supra*.

J. LEE RANKIN,
Solicitor General.
CHARLES K. RICE,
Assistant Attorney General.
JOSEPH M. HOWARD,
JOHN J. MCGARVEY,
Attorneys.

APRIL 1957.

APPENDIX

1. Opinion Below

In the United States Court of Appeals for the First Circuit

No. 5132

William V. Massei, defendant, appellant,

v.

United States of America, appellee

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS

Before Magruder, *Chief Judge,* and Woodbury and Hartigan, *Circuit Judges*

OPINION OF THE COURT

(February 27, 1957)

Hartigan, *Circuit Judge.* This is an appeal from a judgment entered in the United States District Court for the District of Massachusetts upon the verdict of a jury finding the appellant guilty on each of five counts of an indictment charging him with willfully and knowingly attempting to defeat and evade a large part of the income tax due and owing by him and his wife to the United States for the calendar years 1946,

1947, 1948, 1949 and 1950, in violation of § 145 (b) of the Internal Revenue Code, 26 U. S. C. § 145 (b).[1] The appellant was sentenced to concurrent terms of imprisonment of two years on each count and fined $5,000. Execution of sentence was stayed pending appeal. Although the nearly 800 page record before us contains voluminous facts that concern the many contentions made by appellant, as is the usual situation in such cases, we shall set forth only those facts that we believe pertinent to the disposition of this case.

The appellant was a member of the Police Department of Worcester, Massachusetts, from January 1923 to December 1951. The appellant's assignments as a police officer can be best presented by the chart below:

Jan. 2, 1923 to June 1, 1923	Night patrolman.
June 1, 1923 to Feb. 15, 1924	Plainclothesman on vice and liquor squad.
Feb. 15, 1924 to Dec. 4, 1931	Precinct 1—night duty.
Dec. 4, 1931 to April 20, 1932	Injured.
April 20, 1932 to Mar. 1, 1933	Plainclothesman on headquarters squad.[2]

[1] "§ 145. *Penalties*

* * * * *

"(b) *Failure to collect and pay over tax, or attempt to defeat or evade tax.* Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guility of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

[2] Duties of the headquarters squad were the same as the vice squad, i. e. to suppress all forms of vice.

Mar. 1, 1933 to Jan. 15, 1934	Precinct 1—night duty.
Jan. 15, 1934 to Jan. 20, 1936	Plainclothesman on headquarters squad.
Jan. 20, 1936 to Jan. 10, 1938	Precinct 1—night duty.
Jan. 10, 1938 to Sept. 11, 1939	Plainclothesman on headquarters squad.
Sept. 11, 1939 to Jan. 6, 1940	Precinct 1—night duty (promoted to sergeant).
Jan. 6, 1940 to June 1, 1943	Headquarters squad, sergeant in charge.
June 1, 1943 to June 1, 1947	Personnel officer.[3]
June 1, 1947 to Oct. 1, 1949	License Board investigator.[4]
Sept. 8, 1947	Promoted to lieutenant.
Oct. 1, 1949 to Dec. 31, 1951	Personnel officer.

Appellant's salary for the years 1946, 1947, 1948, 1949 and 1950 was $2,850, $3,300, $3,300, $4,080, $4,080, respectively. From 1937 to 1945 he earned from $2,100 to $2,850 a year. Although the payroll records for the years prior to 1937 had been destroyed and could not be produced, presumably he did not earn more than $2,100 a year during that period. Appellant's wife from 1933 to 1951 was a housewife with no source of money except that which the appellant gave to her. She has never at any time inherited or received as a gift any money or other valuables.

The Government established the above facts at the trial in attempting to prove that appellant had filed false and fraudulent joint tax returns, for himself and his wife, for the years 1946 to 1950, inclusive. The theory of the Government's case was that the joint

[3] Duties of this office were to inspect the physical plant and personnel and to see that patrolmen carried out their assignments.

[4] Duties of this office were to investigate license applications for hackney carriages, taxi drivers, gas stations and parking lots.

net worth of the appellant and his wife was greater at the end than at the beginning of each year in issue, and that the source of their increased net worth was taxable income which exceeded that reported in their joint tax returns.

In this connection the Government produced in evidence the joint returns of the appellant and his wife for the prosecution years which reflected total income of $3,232.62, $3,539.66, $4,549.28, $5,004.91 and $6,701.75 for the years 1946 to 1950, respectively. In contrast to the reported income the Government presented evidence tending to establish that on December 31, 1945 appellant had a net worth of $61,080.73 and that on December 31, 1950 appellant had an accumulated net worth of $149,504. Appellant's net worth increases and receipts during the prosecution years, based on records of purchases of annuities, automobiles, land and securities by appellant and his wife, were $27,265.38, $9,991.64, $5,533.22, $9,599.72 and $36,033.31 for the years 1946 through 1950, respectively. Moreover, the Government established that prior to the indictment years there was evidence of receipts by appellant far in excess of the salary paid him. There was no evidence that appellant had ever received any gifts or devises other than an one-half interest in a house which will be discussed below. Since, after a careful study of the record, we believe that the figures concerning opening net worth and increases in net worth during the prosecution years were sufficiently grounded in the evidence, it is not necessary to set forth in detail the many items of proof with respect to them.

As to the likely source of the appellant's net worth increases during the indictment years, the Government stated in its bill of particulars as follows:

"1. The likely source of unreported income of the defendant is moneys received by the defendant as an individual from many persons engaged in various illegal activities for the performance by the defendant of his official duties as a member of the Worcester Police Department, for the non-performance by the defendant of his official duties as a member of the Worcester Police Department, and for the performance by the defendant as a member of the Worcester Police Department of services rendered to such persons in connection with such illegal activities."

The Government's theory, plainly stated, was that appellant throughout his career as a police officer had taken graft. The only evidence in support of this theory was that, during the period when the case was under investigation by the Treasury Department, the appellant, through an attorney who represented him only prior to trial, on four instances admitted to Government agents that appellant had taken graft during the pre-indictment years. This evidence was admitted over the appellant's objections and was relied upon by the prosecution to establish the source from which it was likely that the appellant derived his unreported income during the prosecution years.

The record discloses that on November 27, 1951 appellant's attorney arranged for the opening by the appellant of his safe deposit box in a Westerly, Rhode Island bank, so that agents Hurst and Calatrello might examine its contents. The agents testified in substance that while Hurst was dictating an inventory of the contents to Calatrello, Hurst turned to the appellant and asked him "the source of the funds that were used to acquire the various assets." The appellant replied that "it came from many different people at different times * * * many years ago," whereupon appellant's attorney interrupted and stated

that the appellant got the funds during prohibition days "from letting liquor trucks roll" through Worcester. The appellant then "picked up the conversation again and said he got the funds in the nature of a gift and therefore he didn't report it or he didn't think it was taxable."

Moreover, prosecution witnesses testified that on three occasions appellant's attorney, in the absence of the appellant, told them that the money spent by the appellant from 1946 to 1950 came from graft taken by appellant during prohibition days and while he was on the vice squad between 1933 and 1943. These occasions were as follows: (a) on an unspecified date in November or December 1951 to Hurst in his office; (b) on January 24, 1952 to Hurst in his office; and (c) on May 20, 1952 to Hurst and attorney Isber of the Treasury's District Counsel's office in Isber's office at a conference during which appellant's attorney was endeavoring to persuade Isber to recommend against criminal prosecution of the appellant.

Government witnesses also testified that during the conference of May 20, 1952 with Isber, appellant's attorney stated that in February 1949 the appellant obtained "X dollars, after the death of his father, who had saved a lot of cash" from a partnership interest in a tavern which was engaged in the illegal sales of liquor. F. Joseph Donohue, Register of Probate for Worcester County, testified that the petition for probate of the will and the will itself of Pilade Massei, appellant's father, had been duly filed and allowed but no inventory or account had ever been filed. John Bianchi, executor of the will, testified that he had filed no inventory and that the only asset of the estate which he could find was a three tenement house in Worcester. It was established that the appellant in 1949 had received only an one-half interest in the three tenement house from his father's estate.

The trial judge, before admitting the agents' testimony concerning admissions made by appellant's attorney, held voir dire hearings on the attorney's authority to make such admissions for appellant. At these hearings testimony concerning the Treasury Regulations governing powers of attorney and appellant's attorney's statements was heard. Specifically, the Government presented evidence of many letters between appellant's attorney and agent Hurst showing that the attorney had acquired from appellant and had produced whatever information concerning appellant's finances that Hurst requested during the period of investigation before criminal prosecution was decided upon. The evidence revealed that the appellant through his attorney had cooperated fully with the investigating agents. However, the power of attorney that was supposed to have been given by appellant, as provided for by the Treasury Regulations, could not be produced, although there was substantial evidence that such a power of attorney had been filed.

After the voir dire the district court ruled that the statements of appellant's attorney would be admitted into evidence but "that the ultimate question of the authority of the agent to make admissions binding upon this defendant will be for the jury, under instructions which the Court will consider proper at the appropriate time."

Due to this ruling the appellant endeavored to establish the atmosphere and context in which his attorney's statements had been made. The appellant took the position and offered evidence to show that, at the conferences with Hurst and Isber, his attorney was speaking argumentatively and hypothetically with no intention of binding his client. For example, the appellant offered testimony that his attorney cited

decisions to Isber and that he had no personal knowledge of appellant's activities during prohibition and the time he was on the vice squad. The district court, at first, refused to allow such testimony and had it stricken when it was recited, stating that "anything that is a contention I am going to exclude, * * * I am not going to have anything go in that is a contention or an argument, whether it's by the Government or the defendant." Later in the trial, however, the court, without stating the reason for its change of mind, did allow such testimony. Indeed, the attorney, appellant's only witness, was permitted to testify at length that his entire presentation to Isber was a legal argument based upon hypotheses and assumptions. And in its charge the court clearly left it to the jury to determine if the attorney's remarks had been statements of fact or hypotheses, specifically stating "you may not consider them against the defendant, * * * if you find that the alleged statements of fact * * * were made as hypotheses."

The trial judge further charged, concerning the statements of graft taking, as follows:

> "Now, if you find that the admissions alleged were made, you have to go a step further. Then it becomes your duty to determine if a source is established, because that is what is necessary. Now, I say this advisedly: the source which the Government alleges—and if I am wrong I desire to be corrected—is illegal payments by persons unknown to induce this defendant Massei to perform acts of misfeasance, malfeasance and nonfeasance, to do something that was improper, that was wrong, and that with particular application to the position which he held, a position of a fiduciary nature, a position of a police officer, a member of the police force of the City of Worcester. There is a presumption, and I am going to instruct you on this, there is a presumption that a police

officer does not receive illegal payments. That is a very, very efficacious presumption, and it would apply to other men holding offices of trust and confidence, but if you find that that presumption had been rebutted, and rebutted by the test that I have given you, has been rebutted, for example, by the admissions made by the defendant, so far as the presumption applies to him, then I charge you that you may infer, having in mind his continued position in the police department, you may infer that continued payments of this sort were a likely source of the increases in net worth reflected by the Government's evidence, if you find that they showed it."

The appellant objected to the admissibility of his attorney's statements on the grounds of relevancy and materiality, among others, and at the conclusion of the evidence generally moved to strike the testimony concerning the statements made by his attorney on the ground that they were not corroborated by the evidence.

At the close of the Government's case the appellant moved for a verdict of acquittal on the ground "that the evidence on each count is not legally sufficient to support a conviction." The court refused to pass on the motion in view of the fact appellant had not rested his case. At the close of all the evidence appellant renewed his motion for a verdict of acquittal, stating specifically to the court, among other things, that as to likely source the Government had presented only "these alleged admissions by [appellant's attorney] talking about the defendant's activities back in prohibition days, and also the defendant's activities back when he was on the Vice Squad—all prior to 1943. There is absolutely nothing, if your Honor please, in this case, by way of evidence bearing on the years in question—absolutely nothing."

On appeal the appellant presents as contentions, among others, that the alleged admissions made by him through his attorney were unauthorized, irrelevant and uncorroborated. Further, he argues that without these admissions the Government failed to prove a likely source of the appellant's increases in net worth. Therefore, appellant contends the district court should have granted his motion for a verdict of acquittal made at the close of all the evidence.

The Government, on the other hand, urges that the question of whether appellant's attorney had the authority to make the statements in issue properly was left to the jury. As to relevancy, it urges that the statements were relevant as to the establishment of the starting net worth, as to likely source and as tending to prove previous tax evasions, which, the Government claims, would show fraudulent intent on the part of appellant to evade his taxes during the prosecution years. Moreover, the Government seems to maintain that the admissions of graft taking were fully corroborated by independent evidence that appellant remained on the police force through the indictment years and that appellant had net worth increases that cannot be explained in any other way.

After a careful consideration of the record and the briefs, we are of the opinion that the judgment of conviction cannot stand mainly on the ground that the admissions of appellant through his attorney; whether they were properly admissible or not, as the only evidence of likely source, were not corroborated by independent evidence. In view of this the trial judge erred in not striking out the admissions and in not granting the appellant's motion for a verdict of acquittal. Although we believe the crucial issue in this case is that dealing with corroboration of the aforementioned admissions, we shall also touch upon other questions involved therein.

The Supreme Court in *Holland* v. *United States*, 348 U. S. 121, 125 (1954) stated "that the Government deems the net worth method useful in the enforcement of the criminal sanctions of our income tax laws. Nevertheless, careful study indicates that it is so fraught with danger for the innocent that the courts must closely scrutinize its use." Further, the Court [at p. 129] declared that "Appellate courts should review the cases, bearing constantly in mind the difficulties that arise when circumstantial evidence as to guilt is the chief weapon of a method that is itself only an approximation." After these general cautionary remarks, the Court set forth certain safeguards for net worth cases. In this connection it was stated [at pp. 137–138] that "Increases in net worth, standing alone, cannot be assumed to be attributable to currently taxable income. But proof of a likely source, from which the jury could reasonably find that the net worth increases sprang, is sufficient." Recently, in reviewing a civil tax deficiency case, we interpreted the above language as meaning that proof of a likely source is "an indispensable element of the net worth method in any of its applications." *Thomas* v. *Commissioner of Internal Revenue*, 232 F. 2d 520, 526 (1 Cir. 1956).

Generally, likely source has been proved in net worth cases in two ways. Where the taxpayer disclosed ownership of a business it was considered sufficient proof of likely source for the Government to establish that the disclosed business was capable of producing much more income than was reported. *Holland* v. *United States*, supra. Also, where the taxpayer was an owner of an undisclosed business, proof that the undisclosed business was capable of producing income was considered sufficient. *United States* v. *Johnson*, 319 U. S. 503 (1943).

But absent an income producing business, proof of likely source has been of a different kind. For example, in *United States* v. *Chapman*, 168 F. 2d 997, 999 (7 Cir. 1948), cert. denied 335 U. S. 853 (1948), were the bill of particulars in effect stated "that the source of the 'other income' was the illegal sale of meat at overceiling prices," the Government introduced the evidence of seven meat peddlers all of whom testified that during the year 1943 they paid overceiling prices, paying the excess in currency either to Chapman, the defendant, or his agents. Likewise, in *United States* v. *Skidmore*, 123 F. 2d 604 (7 Cir. 1941), cert. denied 315 U. S. 800 (1942), where the theory of the Government apparently was that defendant had received unreported income from payments for "protection", there was some evidence of payments made to the defendant by bookmakers.

And in a recent case, which bears a striking similarity to the case at hand, where the Government's theory was that the unreported taxable income was graft received by the defendant for nonperformance of his duties as a policeman and as a member of the vice squad, "[a]lthough there was no direct evidence that the defendant ever received a bribe, the evidence did disclose that he had 'opportunities' flowing from his position in charge of the investigation of vice." *United States* v. *Ford*, 237 F. 2d 57 (2 Cir. 1956). The evidence in the *Ford* case as to "opportunities" of the defendant to receive bribes, though seemingly not essential to the majority's holding, disclosed that there was wide open gambling in Rochester, New York when the defendant was on the vice squad; that the defendant did not take any action against one selling policy slips, although he knew about it; that statistics of gambling cases disposed of in the City Court of Rochester indicated an upswing in

prosecution of gambling after other officers had been assigned to the squad; and that the defendant was on friendly terms with a professional gambler. See also *Ford* v. *United States,* 233 F. 2d 56 (5 Cir. 1956), cert. denied 352 U. S. 833 (1956).

In the instant case the only direct evidence of likely source were the admissions made by appellant through his attorney in which the latter stated that appellant had taken graft during pre-indictment years. Primarily we must consider, insofar as necessary, the appellant's contention that these statements were inadmissible.

First we turn to the three instances when appellant's attorney stated to the Government agents, in the absence of appellant, that appellant had taken graft. "The general rule is that, upon the trial of an accused person, evidence of another offense, wholly independent of the one charged, is inadmissible." *Bracey* v. *United States,* 142 F. 2d 85, 87 (D. C. Cir. 1944), cert. denied 322 U. S. 762 (1944). In this connection it was stated in *Railton* v. *United States,* 127 F. 2d 691, 693 (5 Cir. 1942):

> "* * * It is logical to conclude, and very apt to be concluded, that because a man was dishonest once he will steal again. It is certainly 'more probable' that a crooked official did steal than if he were an upright one. Yet our law forbids these very premises. It cannot be shown that the accused has committed other similar crimes to show that it is probable he committed the one charged. * * *"

It follows from the above cases, we believe, that it was error for the district court to admit these admissions into evidence and to charge the jury, as it did, that from the admission of graft taking during pre-indictment years it could infer appellant continued taking graft during the indictment years, and

thus find likely source. It is not a legally permissible inference, absent some reasonable connection, that appellant having committed a criminal act in the past, continued to do so. Such an inference, in essence, would fly in the face of the above quoted rule that "[i]t cannot be shown that the accused has committed other similar crimes to show that it is probable he committed the one charged." *Railton* v. *United States,* supra at 693. See also *Lovely* v. *United States,* 169 F. 2d 386 (4 Cir. 1948); *Sang Soon Sur* v. *United States,* 167 F. 2d 431 (9 Cir. 1948); *Bracey* v. *United States,* supra.

Moreover, we do not believe that the admissions of graft taking prior to 1943, when appellant, as a patrolman during prohibition and as a member and head of the vice squad at a later date, had opportunities open to him for graft, were connected with the prosecution years, since there was no evidence whatsoever showing that these opportunities continued during the indictment years when appellant performed totally different duties as personnel officer and license board investigator. See *United States* v. *Adonis,* 221 F. 2d 717 (3 Cir. 1955). Nor do we think that these admissions, due to the remoteness in time from the indictment years and due to the change in appellant's duties as a police officer, are relevant as to likely source, as tending to establish a common design or plan, which seems to have been the situation in *Green* v. *United States,* 176 F. 2d 541 (1 Cir. 1949).

However, it might be contended, aside from the issue of the authority of appellant's attorney to make such statements,[5] that even though the admissions

[5] We note in passing that "[w]hether there was sufficient proof of the agency to warrant the admission of the acts and declarations of the agent in evidence, was a preliminary question for the court to determine." *Cliquot's Champagne,* 70

might not be relevant as to likely source, they would be admissible if they are relevant as to other elements of the crime, specifically opening net worth and intent[5] to evade taxes. See *Green* v. *United States*, supra. Although this might be so, it is significant that the lower court instructed the jury to consider the statements of graft taking only as to likely source. In this connection the court charged:

> "Now, also, with respect to [appellant], there has been some testimony as to his past conduct. Please bear in mind that that evidence was allowed in only as it has some bearing upon the issue of the source of the defendant's income and as bearing upon the charge before this court. You are to consider it only on that issue alone."

Furthermore, we are of the opinion that even if the court had charged the jury to consider the statements of graft taking on the issues of opening net worth and intent to evade taxes, it would have been error. As to opening net worth, the Government certainly

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U. S. 114, 140 (1865). However, the district court here submitted the question of agency to the jury only after holding voir dire hearings and presumably it would not have done so if it had not been convinced that there was sufficient proof of the agency. Under such circumstances we do not believe it was prejudicial error for the court to leave the question to the jury.

[5] The Government states that the tax return history of appellant prior to the indictment years shows very little other income besides his police salary. Further, it urges that from the admission of receipt of graft previous to the indictment a jury could find that in the pre-indictment years Massei evaded his income taxes. Previous evasions constitute relevant evidence of present intent to evade. See *Mitchell* v. *United States*, 213 F. 2d 951 (9 Cir. 1954), cert. denied 348 U. S. 912 (1955); *United States* v. *Sullivan*, 98 F. 2d 79 (2 Cir. 1938); *Tinkoff* v. *United States*, 86 F. 2d 868 (7 Cir. 1936), cert. denied 301 U. S. 689 (1937).

did not need these declarations of graft taking to prove appellant had sizeable holdings on December 31, 1945 by reason of the fact that appellant contended, as appears from all events leading up to the trial, that he had even more money than the Government gave him credit for on that date. As to the intent to evade taxes, assuming prior evasions were relevant, we do not believe that the circumstances surrounding the prior evasions would be relevant. The jury could have been informed of the prior evasions, if any, without mention of the graft taking. Since it was the prior evasions, in themselves, that had probative value as to intent to evade and not the graft taking, the admissibility of such prejudicial evidence would not have been warranted on this issue.

Therefore, the only purpose, as manifested by the court's charge, that these admissions could have served would be to prove that appellant continued taking graft during the indictment years. This, as we have discussed above, is not a permissible inference. To hold otherwise, in our considered judgment, would be to run the danger of convicting the appellant for the taking of graft some years before the indictment when the indictment charges him with income tax evasion.

Our views on admissibility, as expressed above, also apply to the statement made by the attorney, in appellant's presence, concerning graft taking by appellant during prohibition, at the Westerly, Rhode Island bank on November 27, 1951. In fact, this admission in referring only to graft taking during prohibition was even farther removed in time and circumstance from the indictment years than the others.

But, notwithstanding the issue of admissibility, the aforementioned admissions should not have gone to the jury as part of the Government's case since they

were not corroborated. In *Smith* v. *United States,* 348 U. S. 147 (1954), where the defendant had made extra-judicial admissions concerning his net worth which the Government presented as part of its case, the Supreme Court held that an admission embracing a vital element of the crime made after the fact to an investigating official must be corroborated by sufficient independent evidence. In so holding the Court stated at page 155:

> "The negative implications of petitioner's opening net worth admission formed the cornerstone of the Government's theory of guilt. Without proof that assets on hand at the beginning of the prosecution period did not account for the alleged net worth increases, the Government could not succeed. * * * An admission which assumes this importance in the presentation of the prosecution's case should not go uncorroborated, and this is true whether we consider the statement an admission of one of the formal 'elements' of the crime or of a fact subsidiary to the proof of these 'elements.' It is the practical relation of the statement to the Government's case which is crucial, not its theoretical relation to the definition of the offense."

Similarly, we believe that in the case before us the statements of graft taking, made by the appellant's attorney, "formed the cornerstone of the Government's theory of guilt," since without them there would be no proof of likely source. In the *Smith* case, the Court, after reviewing evidence, independent of the admissions, dealing with the defendant's assets, was satisfied that there was sufficient evidence corroborating the defendant's admissions as to net worth. Likewise, in *United States* v. *Calderon,* 348 U. S. 160 (1954), where the admissions of the defendant also concerned net worth, the Court found corroboration.

The Government, apparently influenced by the nature of the evidence reviewed by the Supreme Court in the above two cases in deciding the issue of corroboration, in its brief has set forth in great detail its independent evidence as to the appellant's assets and net worth increases. Then it urges that just as that type of evidence was held to be sufficient corroboration of the admissions in *Smith* and *Calderon,* it should be so held here. As additional evidence of corroboration it points to the fact that appellant was proved to have been a police officer as stated in his admissions.

We cannot agree with the Government on this point. We think that independent evidence of the defendants' expenditures, assets and bookkeeping techniques was held sufficient corroboration in *Smith and Calderon,* either as bolstering the admissions or as evidence tending to establish the crime independent of the admissions, by reason of the fact that the admissions in those cases concerned the net worth of the defendants. Here the admissions of graft as relating to likely source disclosed from *where* appellant's net worth increases likely came. Only independent evidence of some actual graft taking or, at least, opportunity for graft taking could serve as sufficient corroboration of such admissions. Evidence of unexplained net worth increases does not either bolster the admissions of likely source or establish this element of the crime independent of the admissions, for that evidence, independent of the admissions, does not tend to prove from *where* the net worth increases likely issued.

Nor does the fact that the Government, in addition, independently proved that appellant was a member of the police force during prohibition and a member of the vice squad prior to 1943 provide the necessary corroboration for the pre-indictment years. And cer-

tainly independent proof that appellant remained on the police force during the indictment years also falls short of the corroboration, especially since the appellant during the indictment years was performing duties different from those referred to in his admissions.

The Government had to present some evidence of actual graft taking or opportunity for such in order to establish the element of likely source independent of the admissions. Since it failed to do this, the district court should have stricken the evidence concerning the admissions from the record. And since without the admissions there was no evidence of likely source in the record, it should have granted appellant's motion for a verdict of acquittal.

Finally, we must turn to the Government's contention, which the district court adopted in its charge, that even without proof of likely source the appellant could be convicted under the indictment for the year 1949 under the holding of *United States* v. *Adonis,* supra. That case seems to hold that where a defendant has made a "calculated misrepresentation designed to conceal current income" [at p. 720] proof of likely source is not necessary. The Government would have us look upon the statement of appellant's attorney, made on May 20, 1952 before Government attorney Isber, that appellant obtained "X dollars" from his father's estate in 1949, as such a "calculated misrepresentation."

Here, too, the Government's contention must fall. In the *Adonis* case the defendant had previously misrepresented the source of his income in a judicial proceeding so as to carefully explain away most all his income for the year under indictment. In the case before us appellant's attorney while urging against criminal prosecution presented the appellant's inherit-

ance without even stating an amount. Since we do not believe this was a "calculated misrepresentation" within the meaning of the *Adonis* case, we believe that case is inapplicable.

While we have mentioned the *Adonis* case, above, and the Second Circuit *Ford* case, earlier in this opinion, we do not mean to infer that we either approve or disapprove of the exceptions to the necessity of proving likely source that these holdings seem to have established. Suffice it to say that we believe that constitutional guarantees of a defendant must be as zealously guarded in tax evasion cases based upon the net worth theory as they are in other criminal cases. Inroads upon the enunciated net worth safeguards can only result in forcing the accused to prove his innocence, an inherent danger of the net worth theory from inception.

A judgment will be entered vacating the judgment of the District Court, setting aside the verdict, and remanding the case for further proceedings not inconsistent with this opinion.

WOODBURY, *Circuit Judge* (Dissenting). It seems to me that proof of position on a municipal police force, where everyone knows opportunities for graft exist, is as much proof of a likely source of unreported income as is proof of ownership of a business capable of producing income. Cf. *Holland* v. *United States*, 348 U. S. 121 (1954). And this is especially true where there is evidence, which I think admissible, indicating that a position on the police force had been a bountiful source of unreported income in the form of graft in prior years.

The admissions made by the appellant's attorney were, I think, clearly within the scope of his authority to speak for the appellant. I cannot recognize the

legitimacy of such a "special authority" as that contended by the appellant, whereby the authority for the admission depends on facts subsequent to the utterance, i. e. if the admission works out to the advantage of the principal it was authorized, but if ultimately disadvantage results, there was no authority. And the fact that the admissions constituted evidence of the commission of a crime other than the one for which the appellant was on trial does not necessarily render the admissions inadmissible. Relevancy is the test of admissibility of this kind of evidence. That is to say, the degree of probative force as weighed against the possibility of undue prejudice determines admissibility. Irrelevant testimony of the commission of some crime other than the one with which a defendant is charged is so highly prejudicial that it is not admissible for that reason.* But otherwise relevant testimony is not rendered inadmissible only because of its tendency to show the commission of another crime. *Green* v. *United States,* 176 F. 2d 541, 543 (C. A. 1, 1949). Whether the prejudicial tendency of relevant evidence of the commission of some other crime outweighs its probative value in the case on trial is a matter committed to the discretion of the trial court. Here the evidence of prior graft as a police officer is so logically relevant to prove a continuing source of unreported income that I think the court not only did not abuse its discretion in admitting the evidence but was quite right in doing so. It seems to me that proof of substantial increases in net worth during the

*Evidence of the commission of another unrelated crime can not be admitted merely to prove the defendent a "bad man," and therefore more likely to have committed the crime alleged than a "good man" with a clean record. While such evidence may in some situations be of some remote relevance, the probability of undue prejudice to the defendant therefrom so far outweighs its probative force with respect to the particular crime alleged that it is universally excluded .

prosecution years, coupled with evidence of a thorough but fruitless search for a non-taxable source for those increases, served the dual purpose of providing adequate corroboration for the admissions of graft-taking during pre-prosecution years and in addition warrants the inference that the appellant continued to take graft during the years covered by the indictment. The fact that the appellant's assignments as a police officer during the prosecution years were different from his previous assignments does not indicate that he did not take graft during the indictment years. I think there can be little doubt that opportunities for graft exist whatever a police officer's assignments or rank may be. Indeed, with higher rank the opportunities probably would increase. I would affirm on the general line of reasoning followed by Judge Hinks in *United States* v. *Ford,* 237 F. 2d 57 (C. A. 2, 1956).

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2. JUDGMENT BELOW

On the same day, February 27, 1957, the following judgment was entered:

JUDGMENT

(February 27, 1957)

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is vacated, the verdict is set aside and the case is remanded for further proceedings not inconsistent with the opinion passed down this day.

By the Court:

/s/ ROGER A. STINCHFIELD,
Clerk.

Thereafter, on March 15, 1957, mandate issued and the original papers were returned to the District Court.

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3. Order Extending Time for Filing Petition

[Copy]

In the Supreme Court of the United States

No. —, October Term, 1956

United States of America, petitioner

v.

William V. Massei

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon consideration of the application of counsel for petitioner,

It is ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including April 8, 1957.

/s/ Felix Frankfurter,
Associate Justice of the Supreme Court of the United States.

Dated this twenty-ninth day of March, 1957.

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DEC 2 1957
JOHN T. FEY, Clerk

No. 98

In the Supreme Court of the United States

OCTOBER TERM, 1957

UNITED STATES OF AMERICA, PETITIONER

v.

WILLIAM V. MASSEI

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES

J. LEE RANKIN,
Solicitor General,
CHARLES K. RICE,
Assistant Attorney General,
EARL E. POLLOCK,
Assistant to the Solicitor General,
JOSEPH F. GOETTEN,
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INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	2
The evidence	4
The charge	15
The decision below	18
Summary of argument	21
Argument	23
I. The court below erred in holding that proof of a likely source of unreported income is an indispensable element of the net-worth method in any of its applications	25
A. Proof of a likely source is only one of alternative methods of supporting the inference that the net-worth increases are attributable to currently taxable income	25
B. The Government's evidence in this case was ample to support the inference that the net-worth increases are attributable to currently taxable income	30
II. The court below erred in holding that respondent's admissions of graft-taking in pre-indictment years should have been excluded	34
A. The admissions were relevant	34
B. The admissions were corroborated	37
Conclusion	40

448548—57——1

CITATIONS

Cases:

	Page
Bracey v. *United States*, 142 F. 2d 85, certiorari denied, 322 U. S. 762	35
Friedberg v. *United States*, 348 U. S. 142	24
Hasson v. *Commissioner*, decided May 16, 1955 (T. C.)	25
Hasson v. *Commissioner*, 239 F. 2d 778	25, 28
Holland v. *United States*, 348 U. S. 121	21, 24, 26, 27, 28, 30, 33
Laughinghouse v. *Commissioner*, 227 F. 2d 477	25
Opper v. *United States*, 348 U. S. 84	37, 39
Pate v. *Commissioner*, decided March 29, 1957 (T. C.)	25
Phillips' Estate v. *Commissioner*, 246 F. 2d 209	31
Smith v. *United States*, 348 U. S. 147	24, 37, 38, 39
Thomas v. *Commissioner*, 232 F. 2d 520	24, 26
Thomas v. *Commissioner*, 223 F. 2d 83	25, 28
United States v. *Adonis*, 221 F. 2d 717	25, 28, 29, 30, 32
United States v. *Calderon*, 348 U. S. 160	24, 37, 38, 39
United States v. *Donovan*, 142 F. Supp. 703	24
United States v. *Ford*, 237 F. 2d 57, certiorari granted, 352 U. S. 1000, indictment dismissed as moot, November 18, 1957	24, 28, 29, 30, 33
United States v. *Johnson*, 319 U. S. 503	24, 33
United States v. *O'Malley*, 131 F. Supp. 409	24

Statutes:

Internal Revenue Code of 1939, Section 145 (b) (26 U. S. C. 1952 ed., Sec. 145 (b))	2

In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 98

UNITED STATES OF AMERICA, PETITIONER

v.

WILLIAM V. MASSEI

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The majority and dissenting opinions of the Court of Appeals (R. 795–810) are reported at 241 F. 2d 895.

JURISDICTION

The judgment of the Court of Appeals was entered on February 27, 1957. (R. 811.) On March 29, 1957, by order of Mr. Justice Frankfurter, the time for filing a petition for certiorari on behalf of the United States was extended to and including April 8, 1957. (R. 811–812.) The Government's petition for certiorari was filed on April 5, 1957, and was granted on May 20, 1957. (R. 812.) The jurisdiction of this Court rests upon 28 U. S. C., Section 1254 (1).

QUESTIONS PRESENTED

1. Whether the court below erred in holding that, in a tax evasion prosecution based on the net-worth method, proof of a likely source of the respondent's net-worth increases is an indispensable element of the Government's burden.

2. Whether the court below erred in holding that the trial judge should have excluded extrajudicial admissions by respondent, a public official, that he had taken graft in pre-indictment years.

STATUTE INVOLVED

Internal Revenue Code of 1939:

SEC. 145. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * *

(26 U. S. C. 1952 ed., Sec. 145.)

STATEMENT

On February 16, 1953, an indictment in five counts was returned against respondent in the United States

District Court for the District of Massachusetts, charging wilful attempted evasion of income tax due and owing by himself and his wife for each of the years 1946 through 1950, in violation of Section 145 (b) of the Internal Revenue Code of 1939. (R. 4–8.) The amounts of respondent's reported and correct net income and tax liability, as alleged in the indictment, were as follows:

Year	Reported		Correct	
	Income	Tax	Income	Tax
1946	$3,232	$361	$29,158	$11,474
1947	3,539	416	12,336	2,990
1948	4,549	501	6,322	881
1949	4,504	549	11,131	1,880
1950	6,031	862	37,646	11,467

The Government's case was based upon the net-worth method of proof. The bill of particulars (R. 13–14) which was filed in compliance with an order of the District Court recited, in effect, that "[t]he likely source" of the alleged unreported income was graft.[1] After a jury trial, respondent was found

[1] The bill of particulars reads, in part, as follows (R. 13):

1. The likely source of unreported income of the defendant is moneys received by the defendant as an individual from many persons engaged in various illegal activities for the performance by the defendant of his official duties as a member of the Worcester Police Department, for the non-performance by the defendant of his official duties as a member of the Worcester Police Department, and for the performance by the defendant as a member of the Worcester Police Department of services rendered to such persons in connection with such illegal activities.

guilty as charged. (R. 757–758.) On May 8, 1956, he was sentenced to imprisonment for two years and fined $5,000. (R. 787.)

The Court of Appeals, with Judge Woodbury dissenting, reversed the judgment of conviction on the ground that the prosecution failed to prove a likely source of unreported income to which the net-worth increases could be attributed, and that, accordingly, respondent's motion for judgment of acquittal should have been granted. (R. 795–809.) The majority of the court below held that proof of a likely source of unreported income is "an indispensable element" of the Government's burden in a net-worth case (R. 802–803); that here "the only direct evidence of likely source" consisted of proof of extra-judicial admissions by respondent that he had taken graft in pre-indictment years (R. 804); and that these admissions were uncorroborated and, as such, could not serve as proof of an essential part of the prosecution's case (R. 802). The court further held that the evidence relating to the admissions should have been excluded as irrelevant. (R. 804–806.)

THE EVIDENCE

The evidence adduced by the Government was largely undisputed and may be summarized as follows:

Respondent was a member of the police department of the City of Worcester, Massachusetts, from 1923 until his retirement in 1951. He was promoted to sergeant in 1939 and lieutenant in 1947. Prior to 1940, his principal duty assignments were with the motorcycle patrol and the vice squad. From 1940

until June 1943, he was in charge of the vice squad. Thereafter, he served as personnel officer and as license board officer. One of his duties as personnel officer was to see that patrolmen carried out their assignments. As license board officer, he investigated and passed upon all applications for licenses to operate taxi cabs, gas stations, and parking lots. (R. 200–221.) Prior to 1937, respondent's salary as a police officer did not exceed $2,184 a year (R. 457), and from 1937 through 1945, it ranged from $2,184 to $2,850 (R. 222–223). During the indictment years, his salary increased from $2,850 in 1946 to $4,080 in 1950. (R. 223–224.)

Respondent was born in 1895. (R. 190–191.) From 1916 until his appointment to the police force in 1923, his earnings ranged from $1,800 to $2,750 a year. (R. 457.) In 1933 he married Isabel Cummings, who was then 22 years old. (R. 136, 225, 253–254.) From 1929 until her marriage in 1933, Isabel was employed by the City of Worcester at a salary of $18 to $20 a week. (R. 225.) She was not gainfully employed and had no independent income after marriage. (R. 136, 190, 254.) She never received any gifts or inheritances. (R. 456.) Respondent did not receive any gifts or inheritances at any time, other than a one-half interest in a three-tenement house which he inherited from his father, Pilate Massei, who died in February 1949. The estate of Pilate Massei is referred to more particularly hereinafter.

Respondent filed an income tax return for the year 1920 reporting a tax liability of $19.79. (R. 113.) There was no record of a return filed by him for any

of the years 1921 through 1939[1] (R. 118). For the years 1940 through 1944, he reported a tax liability in the amount of $24.30, $126.48, $304.03, $320.78, and $174.60, respectively. (R. 116–117.) For the year 1945, he reported a gross income of $6,009, including (in addition to his salary) dividends, interest, and other income totaling $2,985, and a tax liability of $1,122. (R. 99–100.)

In years prior to 1946, respondent and his wife deposited in banks and expended sums greatly in excess of his salary and reported income. For example, during a nine month period in 1932 and 1933, respondent purchased securities at a cost of more than $3,200 (R. 153); in March 1939, his wife opened an account in the Worcester Mechanics Savings Bank with a deposit of $1,830 (R. 131); and in 1945, respondent purchased two paid-up retirement annuity contracts from the John Hancock Mutual Life Insurance Company at a total cost of $27,668 (R. 258–265). As of the beginning of the prosecution period, respondent and his wife had accumulated, and he was credited with, a net worth of some $61,000, consisting of cash in banks, $16,006; United States Saving bonds, $16,706; the aforementioned annuity contracts, $27,668; and an automobile, $700. (R. 497–500.)

During the prosecution years (1946–1950), the net worth of respondent and his wife increased from $61,000 to $149,000, largely reflected in cash expenditures for the purchase of paid-up annuity policies, se-

[1] Prior to 1939, respondent's salary as a municipal employee was exempt from the federal income tax.

curities, land, and automobiles, and for the construction of a house. These cash expenditures could not be traced by the agents to any specific source. (R. 497–516.) The assets and liabilities included in the net-worth statement were established by third party testimony and records and were not disputed by respondent. (R. 528–529, 696.) Special Agent Hurst testified that, based upon the increases in net worth plus nondeductible expenditures disclosed by the evidence, respondent's true net income for the years 1946 through 1950 was $29,658, $11,583, $7,967, $11,127, and $37,199, respectively, whereas he reported net income of $3,232, $3,539, $4,549, $4,504, and $6,031, respectively. (R. 502, 504, 507, 509–510, 512.) Revenue Agent Calatrello testified that respondent's correct tax liability for the same years was $11,474, $2,538, $1,035, $1,879, and $11,251, respectively, whereas he reported a tax due of $361, $416, $477, $549, and $862, respectively.[3] (R. 598–599.)

The investigation of respondent's tax liability was commenced in November 1951. (R. 420.) Throughout the course of the investigation and while the case was pending in the Treasury Department, respondent was represented by attorney W. Arthur Garrity. (R. 303, 311, 315.) The agents had direct contact with respondent on only one occasion. (R. 553.) Garrity, who advised the agents early in the investigation (R. 451) that he would "procure the complete picture of the [respondent's] finances," secured from respond-

[3] The Government's net-worth computation, Ex. 44 for identification, is reproduced at R. 775.

ent and submitted to the agents substantially all the information and data requested by them. (R. 449–460, 473–481, 534, 648–653, 622–623, 628–629.) In Garrity's words (R. 433), "he wished to disclose everything."

Among other things, the agents requested information with respect to the receipt at any time of gifts or inheritances by respondent and his wife. The only lead forthcoming from these inquiries during the investigation was that in 1949 respondent inherited from his father the one-half interest in the tenement house. (R. 450–456, 665–666.) The investigation included an analysis of the bank and brokerage accounts of respondent and wife, an examination of public and third-party records, and interviews with persons who had financial transactions with respondent or who were in a position to throw light on his financial history and mode of living. The agents nevertheless failed to uncover any nontaxable receipts which could account for the assets reflected in the net-worth determination. (R. 420–516, 564–570.)

The only occasion on which the agents had direct contact with respondent was on November 27, 1951, when the latter opened his safe deposit box in a Westerly, Rhode Island, bank in the presence of Agents Hurst and Calatrello and his attorney Garrity. (R. 553.) The agents had made arrangements with Garrity to inventory the contents of the box. (R. 436.) In the course of dictating an inventory of the contents of the box to Calatrello, Hurst turned to respondent and asked him (R. 600) "the source of the funds that were used to acquire the various assets".

Respondent replied that "the funds came from many different people," whereupon Garrity broke into the conversation and stated that respondent "got these funds during prohibition days when he let the [liquor] trucks roll through Worcester". Respondent then picked up the conversation again and said that "he got the funds in the nature of a gift and therefore he didn't report it or he didn't think it was taxable". (R. 436–437, 565–566, 600.)

On two other occasions during the investigation, when respondent was not present, one in November or December 1951 and the other in January 1952, Garrity stated to Agent Hurst in the latter's office that respondent had taken graft when he was a motorcycle patrolman during prohibition days and when he was a member and later head of the vice squad. (R. 461–462, 471–473, 485–487.) Hurst testified that at the meeting on January 24, 1952, Garrity said (R. 471) that "the money that showed up on the net worth statement had been accumulated [by respondent] prior to 1945", and that respondent "had received gifts, or graft, or call it what you will, when he was a patrolman on Shrewsbury Street between 1923 and 1931, while letting liquor trucks roll through Worcester, and when he was on the Vice Squad between 1933 and 1943."[4] Similar statements were

[4] Garrity also stated on this occasion (R. 471) that respondent "probably would be willing to pay the deficiencies found by the Revenue Agent". Immediately upon receipt of notice that his tax returns were under investigation, and after making the necessary arrangements through his attorney Garrity, respondent deposited with the then Collector of Internal Revenue the sum of $84,500 in cash to be held by the Collector in a

made by Garrity on May 20, 1952, at a conference in the Office of Regional Counsel, Internal Revenue Service, at which Garrity, Assistant Regional Counsel Isber, and Special Agent Hurst were present. (R. 576–581, 590.)

The admissions of graft-taking by respondent in pre-indictment years were made in an effort to convince the investigating agents and the Regional Counsel's office that the bulge in respondent's net worth was attributable to a cash hoard accumulated through graft prior to 1945 and not credited by the agents. Early in the investigation, Garrity told the agents (R. 443) that "the $85,000 used [by respondent] to purchase the annuities was on hand in 1945",[8] and in January 1952 he told Agent Hurst (R. 460) that respondent claimed "he had between $100,000 and $110,000 net worth as of—before 1945." Garrity main-

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suspense account and applied against any deficiency thereafter determined against respondent. This sum represented the proceeds of insurance policies (retirement annuity contracts) which respondent and his wife surrendered in September 1951. (R. 409–417.)

[8] A substantial part of the bulge in respondent's net worth reflected the purchase with cash of paid up retirement annuities policies. The first policies were purchased in 1945 at a cost of $27,668. Additional policies were purchased in 1946 and 1950 at a cost of $26,212, and $29,947, respectively. (R. 258–271, 514–515.) When Garrity was questioned by Isber at the conference in the Regional Counsel's office about respondent's purchase of the annuity policies for cash, Garrity replied (R. 580–581) that "a smart insurance salesman persuaded the [respondent] * * * that this was a good way to hide cash * * * and that cash—if he kept cash at home it could be lost in case of fire or in case he was robbed and in this way nobody could discover the possession of this large amount of cash."

tained that, since respondent was assigned to personnel work and licensing board duties from June 1943 until his retirement in 1951, he was in no position during the prosecution years to receive graft. (R. 473, 483, 488–489, 495, 579–581, 588.) However, the evidence shows that, even if respondent were credited with an opening net worth in the amount claimed, $100,000 to $110,000, as compared with the $61,000 with which he was credited by the prosecution, it would still leave unexplained a net-worth increase during the prosecution years of some $40,000 or $50,000.

It was apparently in recognition of this deficiency that Garrity stated to Isber, at the conference in the Regional Counsel's office, that (R. 581) in February 1949 respondent obtained "X dollars, after the death of his father, who had saved a lot of cash." The testimony of Agent Hurst, who was present at the conference, was that (R. 491) Garrity stated respondent "had received a certain sum of money after the death of his father in 1949" and that no "specific amount [was] named". Respondent's father, Pilate Massei, died testate on February 2, 1949. The will named as heirs respondent, his brother Edward, and his two sisters. A petition for probate of the will and for the appointment of John Bianchi, a nephew of decedent, as executor was allowed on June 1, 1949. No inventory or accounting was thereafter filed for the estate. (R. 230–232.) No information with respect to the estate was on file with the Inheritance Tax Division of the Commonwealth of Massachusetts. (R. 443–444.) In the course of the investigation, Agent Hurst

interviewed Bianchi, the executor of the estate, and Edward Massei, respondent's brother. (R. 445.) Neither had knowledge of any assets of the estate other than the tenement house, a one-half interest in which passed to respondent. Bianchi testified at the trial that he never came into possession of any personal property of the estate, that he had no knowledge of any, and that he did not make any distribution or payment of bequests as directed by the will. (R. 277–280.) Edward Massei testified that the only property he received from his father's estate was a half interest in the aforementioned real estate plus $600 or $700 which was in a bank account in his father's name as trustee for him. (R. 253.)

The evidence relating to the admissions of graft-taking by respondent in pre-indictment years was received over defense objections and after a *voir dire* hearing on the question of the attorney's authority to make admissions binding upon respondent. (R. 322–405.) Respondent objected to the evidence on the grounds that his attorney was not authorized to make the admissions[6] and that, in any event, the evidence was irrelevant and immaterial. (R. 363–366.) The court in admitting the evidence left for the jury, under guiding instructions (R. 732–733), the question of the authority of the attorney to make admissions binding upon respondent[7] (R. 370, 393, 396, 403).

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[6] Respondent conceded, however, that Garrity had represented him throughout the investigation and while the case was pending in the Treasury Department (R. 292, 311), and that in so doing Garrity endeavored to persuade the Service personnel against recommending criminal prosecution (R. 315).

[7] Initially the court viewed the question of the attorney's authority as one of law. (R. 295–296, 343.)

respondent did not take the stand at the trial. The only witness called by the defense was respondent's former attorney, Garrity, who testified to his version of the conversations with the investigating agents and Assistant Regional Counsel Isber in the course of which the admissions were made. Garrity testified, in substance, that when he referred to graft-taking by respondent in pre-indictment years, he was speaking argumentatively and hypothetically. (R. 621–641.) The question whether Garrity's statements were intended as statements of fact or argument and hypotheses was also left for the jury under guiding instructions. (R. 733.)

At the close of the evidence, respondent moved to strike the testimony relating to the admissions of graft-taking on the grounds that the evidence was incompetent, irrelevant, and immaterial; that it went beyond the scope of the bill of particulars; and that the admissions were uncorroborated. (R. 675.) The motion to strike was denied. (R. 676.)

The defense was twofold: one, that the net-worth increases were attributable to a cash hoard accumulated prior to 1945; and two, that the evidence was insufficient to go to the jury in that the Government failed to prove by direct evidence a likely source of unreported income to which the net-worth increases could be attributed. With respect to the former, the origin of the alleged cash hoard was left unexplained by the defense testimony. As previously noted, Garrity, the only defense witness, testified that, in his conversations with the investigating agents and Isber, his

references to graft-taking by respondent in pre-indictment years were intended as argument and hypotheses and not as statements of fact. (R. 622–636.) In addition, Garrity categorically denied that the agents had questioned respondent about the source of his assets in the course of inventorying the safe deposit box at the Westerly, Rhode Island, bank, and that he and respondent had made the statements attributed to them by the agents. (R. 640, 671.) On cross-examination, Garrity admitted that he had questioned respondent specifically about nontaxable receipts during the prosecution years and that respondent never made any claim to the receipt of such funds. (R. 665–666.)

The main defense contention was that the Government had the burden of proving a likely source of unreported income by direct evidence. This contention was asserted throughout the trial. During the cross-examination of Agent Hurst, defense counsel stated (R. 538) that "the element we are really scrapping about is the source". In his opening statement to the jury, defense counsel argued (R. 610–611) that the Government must establish "the element of source" and that in this case it must do so by evidence of "specific items of unrecorded income". (See also R. 617.) And at the close of the evidence, respondent moved for judgment of acquittal on the grounds that there was a fatal deficiency in the proof in that the prosecution failed to establish by direct evidence a likely source to which the net-worth increases could be attributed. (R. 679–694.)

THE CHARGE

The case was submitted to the jury on alternative theories. The court instructed the jury, in the first instance, that the prosecution had the burden of proving a likely source from which the jury could infer that the net-worth increases sprang; that the prosecution alleged that the source was graft; that there is a presumption that a police officer does not receive illegal payments, but that the presumption is rebutted if the jury should find that respondent admitted taking graft in prior years; and that from the admission of graft-taking in prior years the jury could infer that respondent continued taking graft during the indictment years in view of his continued employment as a police officer, and thus find a likely source of unreported income to which the net-worth increases could be attributed.[5]

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[5] The charge reads, in part, as follows (R. 731, 734):

Before you make the inference of unreported current income, there are certain conditions that you must be satisfied on. First, the Government must establish beyond a reasonable doubt * * * a likely source—remember what I am saying—a likely source of the alleged income. What, in the exercise of your sound judgment, having in mind probabilities, not dealing with the matter capriciously, what constitutes a likely source of income? In this case there has been no direct evidence of the source of the alleged unreported income. * * * In order for you to find a source, therefore, you have to make several findings. * * * The Government, for example, must negate the possibility that the money reflected by the increase in the net worth came from gifts, loans, inheritances, or savings that were in exist-

In the alternative, with respect to counts 4 and 5 relating to the years 1949 and 1950,* the jury was instructed that, if it resolved the factual questions relating to the admissions in respondent's favor but was satisfied that the Government had established his opening net worth and the subsequent increases therein with reasonable certainty and had negated the possibility of nontaxable receipts during the prosecution

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ence at the beginning of the period for which the defendant is charged with evasion. * * *

* * * * * *

Now, if you find that the admissions alleged were made, you have to go a step further. Then it becomes your duty to determine if a source is established, because that is what is necessary. Now, I say this advisedly: the source which the Government alleges—and if I am wrong I desire to be corrected—is illegal payments by persons unknown to induce this defendant Massei to perform acts of misfeasance, malfeasance and nonfeasance, to do something that was improper, that was wrong, and that with particular application to the position which he held, a position of a fiduciary nature, a position of a police officer, a member of the police force of the City of Worcester. There is a presumption * * * that a police officer does not receive illegal payments. That is a very, very efficacious presumption, and it would apply to other men holding offices of trust and confidence, but if you find that that presumption had been rebutted, and rebutted by the test that I have given you, has been rebutted, for example, by the admissions made by the defendant, so far as the presumption applies to him, then I charge you that you may infer, having in mind his continued position in the police department, you may infer that continued payments of this sort were a likely source of the increases in net worth reflected by the Government's evidence, if you find that they showed it.

*It may be noted that respondent's sentence (*supra*, p. 4) was less than he could have received on any one of the five counts in the indictment.

years, and if it was satisfied that respondent had fabricated an account of nontaxable receipts from his father's estate in an effort to explain away the net-worth increases, it could then infer that the net-worth increases were attributable to taxable income. The jury was instructed that under these circumstances (R. 744) "the Government is under no obligation to show a likely source".[10]

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[10] The instruction was as follows (R. 743–744, 755):

I also have to say a few words to you about the other alternative presented by the evidence. If you should find that the alleged admissions were not made, or, if you find that they were made * * * by the attorney without authority from his client, then I charge you that the case stands in this light. If you find the net worth is correct, if you find the increase in net worth is correct as set out, then you are left with the question of source, then you will answer the question of source—I am not charging you now—the only direct evidence of source, except for the statement made by Mr. Garrity to the Internal Revenue Agent was that the defendant received a large sum of cash from his father or his father's estate. That's the only other means of evidence. If you believe this assertion as to source by the defendant, then I must charge you as to the years 1949 and 1950 that the Government has not excluded the possibility that the defendant received money from a non-taxable source and a verdict of not guilty as to these years must be returned; but if you do not believe these assertions by the defendant through his attorney as to source, then I must charge you that as to the years 1949 and 1950 you may infer that the monies reflected by the net worth evidence came from a taxable source.

Now I want to say just one other thing to you. If you find that the story about sums of money, X dollars, coming, allegedly coming from the estate of his father,—if you find that statement was so, that it was made and that it was false, then I am going to charge you, and this would have reference to only one period after the father had

THE DECISION BELOW

The Court of Appeals, with Judge Woodbury dissenting, reversed the judgment of conviction (R. 802). The court acknowledged (R. 797) that "the figures concerning [respondent's] opening net worth and [the] increases in [his] net worth during the prosecution years were sufficiently grounded in the evidence". The court also acknowledged that the prosecution had established expenditures by respondent in pre-indictment years far in excess of his salary and declared income for the same period, and that there was no evidence that respondent or his wife "had ever received" any nontaxable receipts by gift or inheritance. (R. 797.) The majority concluded, however, that the evidence was insufficient to take the case to the jury. The majority reasoned that the Government failed to prove a likely source of income to which the net-worth increases revealed by the evidence could be attributed, and that proof of a likely

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died,—I am going to charge you that the Government is under no obligation to show a likely source if you find there has been a wilful fabrication.

* * * * *

Now, if you find that the defendant wilfully fabricated through Mr. Garrity an account of the receipt of non-taxable income from the father's estate, and that the defendant intended to convey to the representatives of the Bureau of Internal Revenue that the receipt of non-taxable income from that source materially contributed to his increase in net worth during any of the years named in the indictment, you may then infer that the defendant was concealing the receipt of current taxable income. * * *

source is "an indispensable element of the net worth method in any of its applications" (R. 802).

Having already alluded to the Government's theory that the likely source of respondent's net worth increases was graft (R. 797–798), the majority went on to hold (R. 804) that "the only direct evidence of likely source" was proof of admissions by respondent through his attorney that he had taken graft in pre-indictment years; that (R. 806) "notwithstanding the issue of admissibility, the aforementioned admissions should not have gone to the jury * * * since they were not corroborated"; and that, accordingly, the trial court should have stricken the admissions and granted a judgment of acquittal (R. 808).

In rejecting the Government's contention that the admissions were corroborated by a large body of independent evidence relating to the personal and financial history of respondent and his wife in pre-indictment years, the court observed that (R. 808)—

> Here the admissions of graft as relating to likely source disclosed from where appellant's net worth increases likely came. Only independent evidence of some actual graft taking or, at least, opportunity for graft taking could serve as sufficient corroboration of such admissions. Evidence of unexplained net worth increases does not either bolster the admissions of likely source or establish this element of the crime independent of the admissions, for that evidence, independent of the admissions, does

not tend to prove from where the net worth increases likely issued.

The court below further held (R. 808–809) that the evidence was insufficient to take the case to the jury under the court's charge in the alternative (*supra*, pp. 16–17) with respect to counts 4 and 5 of the indictment. The court disposed of this alternative on the ground that the statements relied upon by the Government to show a fabrication by respondent of nontaxable current receipts did not constitute (R. 809) a "calculated misrepresentation".

The court below also stated that the evidence relating to the admissions should have been excluded as irrelevant, since in its view the evidence lacked probative value on the question of source and had no bearing on the element of intent (R. 804–806), and that consequently (R. 804) "it was error for the district court * * * to charge the jury, as it did, that from the admission of graft taking during preindictment years it could infer [respondent] continued taking graft during the indictment years, and thus find likely source."

In dissenting, Judge Woodbury concluded that the evidence relating to the admissions was relevant; that the admissions were adequately corroborated; and that, in view of respondent's continued employment on the police force, and at higher rank, the admissions, coupled with the proof of unexplained net-worth increases, tended to establish that graft was a

likely source of unreported income. (R. 809–810.) Judge Woodbury observed (R. 810):

> Here the evidence of prior graft as a police officer is so logically relevant to prove a continuing source of unreported income that I think the court not only did not abuse its discretion in admitting the evidence but was quite right in doing so. It seems to me that proof of substantial increases in net worth during the prosecution years, coupled with evidence of a thorough but fruitless search for a non-taxable source for those increases, served the dual purpose of providing adequate corroboration for the admissions of graft taking during pre-prosecution years and in addition warrants the inference that the appellant continued to take graft during the years covered by the indictment. * * * I think there can be little doubt that opportunities for graft exist whatever a police officer's assignments or rank may be. Indeed, with higher rank the opportunities probably would increase. I would affirm on the general line of reasoning followed by Judge Hincks in *United States* v. *Ford,* 237 F. 2d 57 (C. A. 2, 1956).

SUMMARY OF ARGUMENT

I

A. The court below erred in interpreting this Court's decision in *Holland* v. *United States,* 348 U. S. 121, as laying down the requirement that proof of a likely source of unreported income is an indispensable element of the net-worth method in any of its applications. The *Holland* decision requires only that

there must be evidence to support the inference that the net-worth increases are attributable to currently taxable income, rather than to nontaxable receipts. Proof of a likely source is only one of several permissible methods of supporting that inference, as the Courts of Appeals for the Second and Third Circuits have held in affirming convictions based on the net-worth method.

B. In the instant case, the Government's evidence, with or without the evidence adduced as to likely source, was ample to support the inference that respondent's net-worth increases were attributable to currently taxable income. This evidence followed three lines of proof: first, there was a large body of evidence revealing a thorough but fruitless search for nontaxable receipts which could account for the increases in net worth; secondly, there was affirmative evidence indicating a consciousness of guilt; and thirdly, there was affirmative evidence tending to show that graft was a likely source of respondent's newly found wealth. It may be argued that any one of these lines of proof was alone sufficient to make a legally acceptable showing. Considered in their totality, however, the proofs were more than sufficient to warrant submitting the case to the jury. And this would be true even without the third category—*i. e.*, evidence as to source.

II

The court below erred in holding that admissions by respondent that he took graft in pre-indictment

years should have been excluded as (a) irrelevant and (b) uncorroborated.

A. The admissions were relevant since under the circumstances the evidence of graft-taking was so connected with the crime of tax evasion that proof of one incidentally involved the other. The admissions not only tended to explain the circumstances of the crime charged but also, to the extent that the admissions tended to show a likely source of unreported income, they constituted evidence supporting the inference that respondent's net worth increases were attributable to taxable income. Here the proofs showed a predisposition and the continued opportunity for graft-taking, coupled with a remarkable contemporaneous increase in net worth.

B. The admissions by respondent that he took graft in pre-indictment years were adequately corroborated by independent evidence relating to his personal and financial history in the pre-indictment years. The trustworthiness of the admissions could hardly be established by more convincing evidence than the proof of deposits and expenditures by respondent in pre-indictment years greatly in excess of his available resources; in fact, as the court below held, the evidence convincingly establishes an opening net worth of some $61,000 at the beginning of the prosecution period.

ARGUMENT

In 1954 the Government's use of the net-worth method of proof in prosecutions for tax evasion was considered and approved in a series of four decisions

by this Court."[11] *Holland* v. *United States,* 348 U. S. 121; *Friedberg* v. *United States,* 348 U. S. 142; *Smith* v. *United States,* 348 U. S. 147; and *United States* v. *Calderon,* 348 U. S. 160. In the *Holland* case, the Court reviewed "the general problems implicit in this type of litigation" and laid down requirements for the use by the Government of net-worth proof in criminal cases. In the companion *Smith* and *Calderon* cases, the Court dealt with the problem of corroboration of statements made by the taxpayer to investigating agents and relied upon by the Government to establish vital links in its proof.

A conflict has now arisen in decisions of the lower federal courts, in both criminal and civil tax cases, on the question whether this Court, in *Holland,* laid down the requirement that proof of a likely source of unreported income is an indispensable element of the net-worth method. The Court of Appeals for the First Circuit has answered this question in the affirmative in both criminal (here) and civil (*Thomas* v. *Commissioner,* 232 F. 2d 520) cases. See also *United States* v. *O'Malley,* 131 F. Supp. 409 (E. D. Pa.); *United States* v. *Donovan,* 142 F. Supp. 703 (E. D. Va.). Its decisions in this respect are in conflict with decisions of the Courts of Appeals for the Second, Third, Fifth, and Sixth Circuits. See *United States*

[11] In an earlier decision, *United States* v. *Johnson,* 319 U. S. 503, this Court approved the use of the net-worth method in a prosecution for tax evasion to support the inference that the taxpayer, owner of a vast and elaborately concealed network of gambling houses, had received unreported income in a substantial amount.

v. *Ford*, 237 F. 2d 57 (C. A. 2d), certiorari granted, 352 U. S. 1000, indictment dismissed as moot, November 18, 1957; *United States* v. *Adonis*, 221 F. 2d 717 (C. A. 3d); *Laughinghouse* v. *Commissioner*, 227 F. 2d 477 (C. A. 5th); *Thomas* v. *Commissioner*, 223 F. 2d 83 (C. A. 6th); *Hasson* v. *Commissioner*, 239 F. 2d 778 (C. A. 6th). The Tax Court has also expressed the view that proof of a likely source is not an indispensable element of the net-worth method.[12]

The Government respectfully submits that the court below erred in holding (1) that proof of a likely source of unreported income is "an indispensable element of the net-worth method in any of its applications"; and (2) that extra-judicial admissions by respondent that he had taken graft in pre-indictment years were irrelevant and uncorroborated.

I

THE COURT BELOW ERRED IN HOLDING THAT PROOF OF A LIKELY SOURCE OF UNREPORTED INCOME IS AN INDISPENSABLE ELEMENT OF THE NET-WORTH METHOD IN ANY OF ITS APPLICATIONS

A. PROOF OF A LIKELY SOURCE IS ONLY ONE OF ALTERNATIVE METHODS OF SUPPORTING THE INFERENCE THAT THE NET-WORTH INCREASES ARE ATTRIBUTABLE TO CURRENTLY TAXABLE INCOME

In reversing the judgment of conviction on the ground that the evidence was insufficient to take the

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[12] *Pate* v. *Commissioner*, decided March 29, 1957 (1957 P-H T. C. Memorandum Decisions Service, par. 57,059); *Hasson* v. *Commissioner*, decided May 16, 1955 (1955 P-H T. C. Memorandum Decisions, par. 55, 121), affirmed, 239 F. 2d 778 (C. A. 6th).

case to the jury, the court below[13] (R. 802–803) based its decision on the premise that this Court's decision in *Holland* v. *United States*, 348 U. S. 121, requires proof of a likely source of unreported income as "an indispensable element of the net-worth method in any of its applications." It is submitted that in so holding the court below has misinterpreted the *Holland* decision.

This Court ruled in *Holland* that there are two essential requirements to the use by the Government of the net-worth method of proving unreported income in a prosecution for tax evasion. In the language of *Holland* (pp. 132, 137), the first "essential condition * * * is the establishment, with reasonable certainty, of an opening net worth, to serve as a starting point from which to calculate future increases in the taxpayer's assets"; the second is "*evidence supporting the inference that the defendant's net worth increases are attributable to currently taxable income*". (Emphasis added.) In laying down these basic requirements, the Court pointed out (pp. 135–136) that the cogency of the Government's proof in a net-worth prosecution "depends upon its effective negation of reasonable explanations by the taxpayer inconsistent with guilt", and it placed upon the prosecution the burden of showing an investigation into the validity of "relevant leads furnished by the taxpayer—leads reasonably susceptible of being checked, which, if true,

[13] In this respect the court below followed its earlier decision in *Thomas* v. *Commissioner*, 232 F. 2d 520, a civil fraud case involving use of the net-worth method.

would establish the taxpayer's innocence"—or risking a directed verdict.

In the *Holland* case (pp. 137–138), this Court found cogent evidence to support the inference that the increases in the taxpayers' net worth were attributable to currently taxable income in the proofs that the taxpayers had not recorded all the income from their hotel business and that the business was "capable of producing much more income than was reported and in a quantity sufficient to account for the net worth increases". After reviewing this evidence, the Court observed (pp. 137–138):

> Increases in net worth, standing alone, cannot be assumed to be attributable to currently taxable income. But proof of a likely source, from which the jury could reasonably find that the net worth increases sprang, *is sufficient.* [Emphasis added.]

It is the above quoted passage in the opinion which the court below interprets as holding that proof of a likely source of unreported income is an indispensable element of the net-worth method in any of its applications.

We think it is clear, not only from the plain meaning of the language quoted but from the context as well, that this Court laid down no such injunction in *Holland.* What *Holland* teaches is that the prosecution must adduce *evidence to support the inference,* which the jury is asked to draw, that the increases in the defendant's net worth are attributable to taxable income, rather than to nontaxable receipts (such as

gifts, loans, inheritances, and the like). What *Holland* holds, in this regard, is that proof of a likely source of unreported income "is sufficient" evidence to support the inference. The language which the court below relies upon was not a statement of requirements but rather a statement descriptive of the proofs which in that case the Court found sufficient to satisfy the requirement. At no point in the opinion does the Court suggest, much less hold, that proof of a likely source of unreported income is "indispensable" to the use of the net-worth method. See *United States* v. *Ford*, 237 F. 2d 57 (C. A. 2d); *United States* v. *Adonis*, 221 F. 2d 717 (C. A. 3d); *Hasson* v. *Commissioner*, 239 F. 2d 778 (C. A. 6th); *Thomas* v. *Commissioner*, 223 F. 2d 83 (C. A. 6th).

It is true that, in a large number of cases, proof of a likely source of unreported income provides (or helps provide) the necessary evidence which will support the inference that the defendant's net-worth increases—current receipts—are attributable to taxable income. But it does not follow that such proof is always indispensable to satisfy the requirement. On the contrary, there are other items of evidence and lines of proof, both affirmative and negative in character, which "may have equal or greater probative value as circumstantial indication that the newly available funds were taxable income." *United States* v. *Adonis*, 221 F. 2d 717, 719 (C. A. 3); *United States* v. *Ford*, *supra*.

In *Ford* and *Adonis*, the Courts of Appeals for the Second and Third Circuits, respectively, affirmed judgments of conviction for income tax evasion based

upon net-worth evidence in the absence of proof of a likely source. In *Ford* the Court of Appeals for the Second Circuit held (p. 65) that proof of a likely source "is not always an indispensable element in a net worth case". Accordingly, it concluded that, "without proof of a likely source", the Government's evidence was "fully adequate to support a finding that the defendant had substantial unreported receipts during the indictment years from some source", and that "all that was needed to complete a *prima facie* case was enough proof to negative the possibility that the unreported current receipts thus established were nontaxable." The latter requirement, in the Second Circuit's view, was satisfied by the evidence of the Government's "exhaustive investigation of the defendant's affairs" which "warranted an inference that he had no nontaxable income during the indictment years not credited to him" by the Government.

In *Adonis* the Court of Appeals for the Third Circuit held (p. 719) that the *Holland* decision "does not say such proof of a likely source is the *only* additional evidence which will suffice to establish the government's case in a situation of this kind." (Emphasis added.) There, the court found the additional evidence in proof that defendant had "wilfully fabricated an account of current non-taxable receipts" in an effort to explain away the net-worth increases firmly embedded in the evidence. In this connection, the court observed (p. 719): "* * * if the jurors were convinced that the taxpayer had thus wilfully fabricated an account of current non-taxable receipts to explain his * * * affluence [in the taxable period] they might reasonably

infer that such conduct was an effort to conceal the fact and real sources of taxable gain * * *. It is this logical inference from the taxpayer's own wilful misrepresentation upon which the government relies here to supply the evidentiary requirement which in other situations is filled by an inference from an affirmative showing of some likely source of income."

B. THE GOVERNMENT'S EVIDENCE IN THIS CASE WAS AMPLE TO SUPPORT THE INFERENCE THAT THE NET-WORTH INCREASES ARE ATTRIBUTABLE TO CURRENTLY TAXABLE INCOME

As in *Ford* and *Adonis,* here too the Government's evidence was more than sufficient (whether considered with or without the evidence as to source) to meet the *Holland* requirement of "evidence supporting the inference that the defendant's net worth increases are attributable to currently taxable income." As to the other *Holland* requirement, it should be noted that the court below (R. 797), as did the trial judge, recognized that respondent's opening net worth, and the subsequent increases therein during the prosecution years, had been established with reasonable certainty.

The evidence to support the inference that respondent's net-worth increases were attributable to taxable income followed three lines of proof. First, there was a large body of evidence (*supra,* pp. 7–8, 11–12) of a negative character revealing a thorough but fruitless search by the agents for nontaxable receipts which could account for the bulge in respondent's net worth. In an effort to track to a source the funds used to acquire the various assets, the investigating agents (among other things) painstakingly analyzed the several bank and brokerage accounts of respondent and

his wife, and interviewed persons who had financial transactions with respondent or who were in a position to throw light on his personal or financial history, including his brother and the executor of his father's estate. They also examined numerous public and third party records. Their task in this respect was not an easy one since respondent dealt largely in cash which "leaves no telling prints to track from whence it came." *Phillips' Estate* v. *Commissioner*, 246 F. 2d 209, 213 (C. A. 5th). Moreover, when the investigating agents inquired concerning the respondent's possible receipt of gifts or inheritances, the agents were told only that respondent had inherited a one-half interest in a house from the estate of his father who died in 1949. Although during the investigation respondent did not claim to have received any cash or other property from his father's estate,[14] the agents nonetheless ran down this lead to possible nontaxable receipts with negative results. Also very pertinent in this regard is the testimony of the attorney Garrity, who had represented respondent throughout the investigation, and who had secured from him and submitted to the agents the information and data requested by them. Garrity admitted on cross-examination that during the investigation he had questioned respondent specifically about nontaxable receipts and that respondent (R. 666) "did not tell [him] of any."

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[14] As pointed out *supra*, pp. 11-12, after the completion of the investigation but prior to the recommendation of criminal proceedings, respondent did make a claim (never substantiated) of a cash inheritance of an unspecified amount.

This category of evidence, we think, was sufficiently strong to warrant the conclusion by the jury that, all reasonable inquiry having been made without discovery of any credible evidence of substantial nontaxable receipts, there was none, and that consequently the net-worth increases must be attributable to unreported taxable income. But, strong as this evidence may be, the Government's case does not rest solely on the inferences to be drawn from proof of a negative character.

Secondly, there was affirmative evidence indicating a consciousness of guilt. The proofs tended to show that respondent had intentionally fabricated an account of nontaxable receipts—"a certain sum" of cash—from his father's estate in an effort to explain away the increases in his net worth for 1949 and 1950. We think the court below (R. 808–809) placed undue emphasis on the fact that no specific amount was mentioned. Viewed in the light of the attending facts and circumstances, the clear import of the phrase "a certain sum" was that respondent had received a substantial amount. There was persuasive evidence (*supra*, pp. 11–12) to negative the claim. The trial court was sufficiently impressed with this line of proof to make it the basis of an instruction (*supra*, pp. 16–17). The court below erred, we believe, in substituting its finding that the statements did not measure up to a "calculated misrepresentation" for the permissible inference to the contrary which the jury may well have drawn from the evidence. See *United States* v. *Adonis*, *supra*.

Thirdly, there was affirmative evidence tending to show that graft was a likely source of respondent's new found wealth. The proof in this respect centered on respondent's position as a police officer with rank in a large metropolitan area, and on his admissions of graft-taking in pre-indictment years which, as we shall show (*infra*, pp. 35–40), were both relevant and corroborated. This line of proof was brought into sharp focus by the evidence relating to respondent's personal and financial history in both the pre-indictment and the prosecution years. That respondent took graft in pre-indictment years is shown by his own admissions. That he continued to do so during the prosecution years is surely a legally permissible inference from this record. Compare *United States* v. *Johnson*, 319 U. S. 503; *United States* v. *Ford*, 237 F. 2d 57 (C. A. 2d).

It may be argued that any one of these lines of proof (together with proof of a reasonably certain opening net worth) was alone sufficient to satisfy the evidentiary requirements laid down in *Holland*. Be that as it may, it is submitted that, considered in their totality, the proofs here were more than adequate to establish a prima facie showing that the increases in respondent's net worth were attributable to currently taxable income. And this is so even if only the first and second lines of proof are considered—*i. e.*, without the third line of proof consisting of the source evidence (which the court below held inadmissible in part). Accordingly, the trial court properly denied respondent's motion for judgment of acquittal.

II

THE COURT BELOW ERRED IN HOLDING THAT RESPONDENT'S ADMISSIONS OF GRAFT-TAKING IN PRE-INDICTMENT YEARS SHOULD HAVE BEEN EXCLUDED

As already pointed out (*supra*, p. 18), the basic premise of the decision below is that "proof of a likely source is an indispensable element of the net worth method in any of its applications." Certainly the court's view as to the importance of the source evidence had a vital bearing on how the court resolved the question of the admissibility of certain admissions made by respondent as to graft-taking in the pre-indictment years. But, irrespective of the validity of the court's premise on the source question,[15] we submit that the court erred in holding that the admissions should have been excluded.

A. THE ADMISSIONS WERE RELEVANT

Although holding that proof of a likely source (*i. e.*, graft in this case) was indispensable, the court below (Judge Woodbury dissenting) held that the admissions of graft-taking by respondent in pre-indictment years were irrelevant and should have been excluded. It based this holding (R. 804) on the general rule of exclusion that "upon the trial of an accused person, evidence of another offense, wholly independent of the one charged, is inadmissible". In the court's

[15] Even if the decision below were correct as to the necessity of proving a likely source, we believe that the Government's evidence in this regard is sufficient to meet such a requirement.

view, there was no evidence to connect the admissions of graft-taking in pre-indictment years with the prosecution's case. This, we believe, was error.

The general rule and the established exceptions are well stated in *Bracey* v. *United States*, 142 F. 2d 85, 87–88 (C. A. D. C.), certiorari denied, 322 U. S. 762, which is cited by the court below:

> The general rule is that, upon the trial of an accused person, evidence of another offense, wholly independent of the one charged, is inadmissible. However, there are many well established exceptions to this rule, raised by the special circumstances of particular cases; to the end that all relevant facts and circumstances tending to establish any of the constituent elements of the crime of which the defendant is accused may be made to appear. Thus, evidence of other criminal acts has been held admissible by this court when they are so blended or connected with the one on trial as that proof of one incidentally involves the other; or explains the circumstances thereof; or tends logically to prove any element of the crime charged. Such evidence is admissible if it is so related to or connected with the crime charged as to establish a common scheme or purpose so associated that proof of one tends to prove the other, or if both are connected with a single purpose and in pursuance of a single object; as well as to establish identity, guilty knowledge, intent and motive.

Thus, as Judge Woodbury pointed out in his dissenting opinion, the mere fact that the admissions constituted evidence of the commission of a crime other

than the one for which respondent was on trial did not necessarily render the evidence inadmissible.

Here, the evidence relating to the admissions (*supra*, pp. 8–11) clearly falls within the established exceptions. The evidence of graft-taking was "so blended or connected" with the crime of tax evasion that proof of one incidentally involved the other. The admissions not only tended to explain the circumstances of the crime charged but also, to the extent that the admissions tended to show a likely source of unreported income, they constituted evidence supporting the inference that respondent's net-worth increases were attributable to taxable income. It must not be overlooked that the essential fact of the admissions was graft-taking, although during pre-indictment years.

The majority of the court below, in viewing the admissions as wholly unconnected with the crime charged, failed to credit the facts of record and to accord fair inferences to them. It can hardly be disputed that the admissions tended to show a predisposition on the part of respondent to take graft. Likewise undisputed is the fact of his continued employment, and at higher rank, as a police officer. Equally telling is the otherwise unexplained net-worth increases revealed by the record. In short, the proofs revealed a predisposition and the continuing opportunity for, as well as the likely fruits of, graft-taking. It seems unrealistic to say, as do the majority below (R. 808), that because of the change in respondent's duty assignments there was no continuing opportunity for graft-taking in the prosecution years despite respondent's higher rank. If respondent could find opportunities

for graft as a motorcycle patrolman, the probabilities are that he had no difficulty in doing so as a sergeant and later a lieutenant in charge of the licensing board functions and responsible for seeing that other policemen carried out their duties.

In this respect, it should be emphasized that the strength of the inference which the jury was permitted to draw was not, as the majority opinion below suggests, grounded solely in the evidence of the admissions. It was the admissions coupled with the opportunity for graft-taking and the otherwise unexplained net-worth increases which furnished a basis for the inference. In the circumstances, surely it can not be said that the inference is so inherently implausible that the trial judge abused his discretion in failing to exclude the admissions as irrelevant.

B. THE ADMISSIONS WERE CORROBORATED

This Court has held that statements made by a taxpayer to investigating agents, after the fact, and relied upon by the Government to establish vital links in its net-worth proof, require corroboration. *Smith* v. *United States,* 348 U. S. 147; *United States* v. *Calderon,* 348 U. S. 160. The necessary corroboration may be provided by independent evidence which either bolsters the admissions or tends to establish the crime of tax evasion independent of the admission. *Smith* v. *United States, supra,* pp. 156–159. The corroborating evidence is sufficient if it "supports the essential facts admitted sufficiently to justify a jury inference of their truth." *Opper* v. *United States,* 348 U. S. 84, 93.

In both *Smith* and *Calderon*, the statements of the taxpayer related to opening net worth. In *Smith* the Court found the requisite corroboration of the admissions as to opening net worth in independent evidence of the taxpayer's personal and financial history in pre-indictment years. It also found corroboration in another line of proof—namely, the evidence of expenditures by the taxpayer during the prosecution years far in excess of reported income, when coupled with proof of a business producing unrecorded amounts of income—since this evidence tended to establish the crime of tax evasion independent of the admission. In *Calderon* the Court held that, although the evidence of the taxpayer's financial history in pre-indictment years was too sketchy to corroborate the opening net worth directly, the evidence as to his financial history and business dealings during the prosecution years provided (p. 167) "sufficient independent evidence of the crime of tax evasion to corroborate his statements * * *."

Here, the admissions related to graft-taking by respondent in pre-indictment years when he was a motorcycle patrolman and on the vice squad. To corroborate the admissions, the Government presented a large body of independent evidence relating to the personal and financial history of respondent and his wife prior to (and during) the prosecution years. This evidence, in broad outline, included proof of respondent's duty assignments as a police officer and of his salary as such; proof of his income tax payments; proof of deposits and expenditures made by him or his wife in

pre-indictment years in amounts far in excess of the declared available resources; and proof of an opening net worth of some $61,000 which could not be accounted for by nontaxable receipts. This evidence, similar in kind to that presented in *Smith* and *Calderon*, was ample to corroborate the admissions. The trustworthiness of the admissions that respondent had taken graft in the pre-indictment years could hardly be established by more convincing independent evidence than the proof of expenditures by him in those years greatly in excess of reported income, culminating in an opening net worth of $61,000.

In rejecting the Government's contention that the admissions were amply corroborated by the independent evidence of respondent's personal and financial history in pre-indictment years, the court below said (R. 808) that "[*o*]*nly independent evidence of some actual graft taking* or, at least, opportunity for graft taking could serve as sufficient corroboration * * *." (Emphasis added.) If this statement constitutes a holding that judicial admissions must be corroborated by *direct* evidence, then the decision is contrary to the pronouncements of this Court in the *Smith, Calderon*, and *Opper* cases. If, on the other hand, the court's statement means that there is no independent evidence in the record showing "opportunity for graft taking" by respondent in pre-indictment years, then the court has failed to credit the facts of record. We note in this respect that the court earlier in its opinion recognized (R. 805) that respondent "had opportunities open to him for graft" during the pre-indictment

years when he was a motorcycle patrolman and on the vice squad.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment below should be reversed and the case remanded to the Court of Appeals.[16]

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DECEMBER 1957.

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[16] The court below did not pass on several issues raised by the respondent (see Br. in Opp. 6), and none of these issues appears appropriate for *de novo* disposition by this Court.

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No. 98

In the Supreme Court of the United States

OCTOBER TERM, 1957

UNITED STATES OF AMERICA, PETITIONER

v.

WILLIAM V. MASSEI

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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Solicitor General,
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INDEX

	Page
I. Where it is proven that an increase in net worth came from unreported taxable income, it is not necessary to prove a likely source	2
1. The *Holland* case does not make proof of a likely source mandatory	2
2. There is no reason to make proof of a likely source mandatory in every net worth case	4
3. There was ample evidence that respondent's receipts must have been taxable income	6
II. The trial court was correct in admitting evidence that respondent received graft during years prior to 1946	9
1. The taking of bribes by a policeman is relevant to the showing of a likely source of taxable income	9
2. The admissions were corroborated	11
3. The admissions were authorized, and hence could not have violated the lawyer-client privilege	12
Conclusion	15

CITATIONS

Holland v. *United States*, 348 U. S. 121	2–3, 5
Smith v. *United States*, 348 U. S. 147	11
United States v. *Adonis*, 221 F. 2d 717	5
United States v. *Calderon*, 348 U. S. 160	11
United States v. *Ford*, 237 F. 2d 57, certiorari granted, 352 U. S. 1000, case dismissed as moot, November 18, 1957	5
United States v. *Johnson*, 319 U. S. 503	6

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REPLY BRIEF FOR THE UNITED STATES

Respondent's brief brings into sharp focus the basic issue in this case. Respondent contends, and the Court of Appeals held, that an indispensible element in every net worth case is proof by the Government of a "likely source" from which the defendant derived the net worth increase which he failed to report. Here, the figures concerning opening net worth and increases in net worth during the prosecution years "were sufficiently grounded in the evidence" (R. 797), were accepted by the Court of Appeals, and are accepted by respondent as proven.[1]

[1] "This case resolves itself into the question of whether the Government satisfied its burden of proving the essential element of a likely source." (Resp. Br. 18) See also Point I

Respondent also accepts the fact that "The Government investigation showed the respondent received no nontaxable receipts." (Br. 20). With it thus established that there was sufficient proof that the net worth increases were not attributable to nontaxable receipts, we submit that it was not necessary for the Government to present affirmative proof of a specific likely source of taxable receipts.

Although evidence of a likely source is not, in our view, always essential in every case, in this case there was, in any event, proof tending to show that graft was a likely source of respondent's unreported net worth increases—evidence which we believe was properly admitted.

I

WHERE IT IS PROVEN THAT AN INCREASE IN NET WORTH CAME FROM UNREPORTED TAXABLE INCOME, IT IS NOT NECESSARY TO PROVE A LIKELY SOURCE

1. THE HOLLAND CASE DOES NOT MAKE PROOF OF A LIKELY SOURCE MANDATORY

Respondent relies wholly on *Holland* v. *United States*, 348 U. S. 121, and contends that that case lays down a rigid rule that in every net worth case the Government must affirmatively show a likely source of taxable income to account for the increases in net worth. But respondent misinterprets the *Holland* opinion.

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of respondent's argument (Br. 20) which treats "the Increases in Net Worth" as a fact not here challenged.

Respondent's comment (Br. 21) that "It is interesting to note that the Government investigation in no way negated the possession of cash by the respondent at the beginning of the period" is incorrect. See, *e. g.*, R. 569–570.

In the first sentence of the section of that opinion entitled *"Net Worth Increases Must be Attributable to Taxable Income"*, 348 U. S. at 137, the Court states the rule to be as follows:

> Also requisite to the use of the net worth method is evidence supporting the inference that the defendant's net worth increases are attributable to currently taxable income.

The Government accepts the applicability of that rule, of course, and believes it was fully satisfied by the proof adduced here.

In the *Holland* case the petitioners claimed that "the Government failed to adduce adequate proof because it did not negative all the possible nontaxable sources * * *." 348 U. S. at 137. The Court found that in the absence of relevant leads from the taxpayer such negative proof was not necessary and that an acceptable substitute was "proof of a likely source." The Court said that "Any other rule would burden the Government with investigating the many possible nontaxable sources of income * * *." 348 U. S. at 138. The *Holland* opinion thus suggests that evidence supporting the inference that the gain was taxable may be *either* in a negation with reasonable certainty of possible sources of nontaxable income *or* by proof a likely source of taxable income *or* by some other evidence. Proof of a likely source was not an additional requirement but was an alternative type of evidence which could be used by the Government where it was difficult or impossible to prove that there had been nontaxable receipts. The *Holland* opinion explicitly recognized that the net worth method

was "a potent weapon in establishing taxable income from *undisclosed* sources." 348 U. S. at 126. (Emphasis added.)

2. THERE IS NO REASON TO MAKE PROOF OF A LIKELY SOURCE MANDATORY IN EVERY NET WORTH CASE

Respondent does not advance any reason for requiring proof of a likely source in every net worth case. We believe there is none. Certainly, evidence of the precise source of a receipt is not necessary to show its taxability. The taxable nature of a receipt does not depend upon the particular source from which it came. In fact, unequivocal proof of the source from which funds came will frequently not resolve the question of whether the funds represent taxable income. Funds withdrawn from a business may represent income or return of capital; funds received from an individual might be a gift, loan, or payment for services rendered.

There is nothing in the statute which would require affirmative proof of a particular source. And there is no logical consideration which should lead a court to conclude that the inference that increases in net worth represent taxable income must rest on evidence of a particular source from which it is likely that the increases came. The test should be, rather, whether there is evidence supporting the conclusion, implicit in a verdict of guilt, that the increase in net worth was not derived from nontaxable receipts, and hence must have been derived from some taxable source.

Evidence of likely source is helpful, and in most cases will make it easier for a jury to be convinced of guilt, but other evidence may be equally or more

persuasive. As pointed out in our main brief, both the Second and Third Circuits have so held. *United States* v. *Ford*, 237 F. 2d 57 (C. A. 2), certiorari granted, 352 U. S. 1000, case dismissed as moot, November 18, 1957; *United States* v. *Adonis*, 221 F. 2d 717 (C. A. 3).

To hold that the Government need not, in every net worth case, prove a likely source does not, as respondent suggests, "put the burden on a defendant to prove his innocence" (Br. 36). The Government must in every case establish, with reasonable certainty, the opening net worth and the increase which takes place. The Government must also, as *Holland* holds, supply evidence supporting the inference that the increase is attributable to currently taxable income; and this burden can be met, we submit, by presenting evidence negating any inference that the increase came from nontaxable sources. Of these essential elements the jury must be convinced beyond a reasonable doubt. The defendant may stay quiet and make the Government prove its case. And this Court has provided further protection against possible conviction of an innocent man by requiring the Government to check all relevant leads reasonably susceptible of being checked (348 U. S. at 136):

> When the Government fails to show an investigation into the validity of such leads, the trial judge may consider them as true and the Government's case insufficient to go to the jury.

To require proof of a particular source of income in every case "would be tantamount to holding that

skilful concealment is an invincible barrier to proof." *United States* v. *Johnson*, 319 U. S. 503, 518.

3. THERE WAS AMPLE EVIDENCE THAT RESPONDENT'S RECEIPTS MUST HAVE BEEN TAXABLE INCOME

As stated in our main brief (pp. 30–31), there was an exhaustive investigation of respondent's financial situation both during the indictment years and before which failed to reveal any nontaxable receipts which would explain the increases in net worth.

But in this case there was not a mere failure to find nontaxable receipts; there was affirmative evidence that there were no nontaxable receipts. It was admitted that respondent's wife had at no time inherited or received as a gift money or other valuables (R. 456). Respondent had not received any gift from his sisters (R. 456) nor had he inherited anything from his father except a half interest in the house in which he was living (R. 253, 278).[2] Beyond this, respondent's lawyer testified that he had inquired of respondent "as to whether he had received anything over and above what was on his tax returns" during the period 1945 to 1950 and that the only nontaxable receipt he had been told about by respondent was the half interest in the house (R. 665). Further, respondent's position, as testified to by his counsel at the trial, was "that all of the cash which he expended

[2] Respondent points out that the value of this house does not appear in the Record. (Br. 8). This is of no significance since, rather than adding the value of the house into the net worth calculation and then subtracting it out as a nontaxable receipt, the house was not included in the net worth calculation at all. R. 508.

during the six-year period from 1945 to 1950 was in his possession at the beginning of 1945." (R. 629). This statement contains not only the contention that respondent received no taxable income during the period (which the jury rejected) but the admission that he received no nontaxable receipts, an admission which the jury was clearly justified in accepting, corroborated as it was by all the other evidence.

Respondent recognizes that there is incontrovertible proof that none of the increase in net worth came from nontaxable receipts. He admits that the Government's evidence "showed the respondent received no nontaxable receipts" (Br. 20). Point I of his argument is that "Evidence Proving No Nontaxable Receipts" is not enough to support the inference that the receipts were taxable. But logic and common sense are against him. All increases in net worth represent either taxable or nontaxable receipts. If, as respondent agrees, the Government showed that "respondent received no nontaxable receipts", the receipts must have been taxable.

As stated in our main brief (p. 32) the inference that the gain was taxable was also supported by evidence of concealment and fabrication of false explanations. Respondent concealed funds by keeping them in nine different accounts in eight different banks or other savings institutions (R. 120, 124, 127, 129, 131, 136, 141, 143, 189). More than half of the accounts were carried in his wife's name. In addition, large purchases were made in cash, for which there were no corresponding withdrawals from any of these ac-

counts.[3] There was also evidence that respondent had purchased the annuity policies because "this was a good way to hide cash" (R. 580).

The testimony that his counsel fabricated a story about respondent's having inherited money from his father is further evidence supporting the inference that the increases in net worth during the years 1949 and 1950[4] were in fact taxable. Respondent now argues that these statements were "immaterial" (Br. [illegible]) since no figure as to the amount inherited was mentioned. But these statements were made in an effort to explain a substantial increase in net worth during the years after his father's death. These statements were to the effect that "Mr. Massei's father had accumulated a large sum of cash with reference to liquor sales" (R. 491), and that respondent had obtained funds after the death of his father who had saved "a lot of cash" (R. 581). The evidence was that no funds whatever reached respondent

---

[3] Evidence was that the following purchases were made with cash during the indictment period (R. 514–516):

Annuity policy	$26,212.40	Lot	$400.00
Deposit on lot	100.00	Auto	400.00
Auto	931.88	Furnishings	800.00
Stock	345.62	Stock	1,680.36
Land	1,600.00	Stock	1,725.92
Stock	714.35	Lot	800.00
Stock	1,140.90	Heating system	1,445.00
Building contractor	4,966.25	Annuity policy	29,947.80
Land	1,200.00	Auto	600.00

[4] Respondent is incorrect in his quotation of the court's instruction on this point (Br. 22) and also incorrect in saying that the court instructed the jury that they could infer a taxable source from this evidence for the year 1948. The court instructed the jury that as to the "period after the father had died" it could find respondent guilty without proof of likely source "if you find there has been a wilful fabrication" (R. 744).

through his father's estate. When taken in context, the jury was entitled to conclude that these statements were deliberately misleading, and that the increases in net worth in the years following his father's death actually represented taxable income.

II

THE TRIAL COURT WAS CORRECT IN ADMITTING EVIDENCE THAT RESPONDENT RECEIVED GRAFT DURING YEARS PRIOR TO 1946

Respondent advances three reasons why the trial court should not have admitted evidence as to his having accepted bribes and graft prior to the period covered by the indictment: (1) that this fact was irrelevant, (2) that the evidence was based on admissions which were not corroborated, and (3) that to introduce the admissions violated the lawyer-client privilege (Resp. Br. 23–33).

1. THE TAKING OF BRIBES BY A POLICEMAN IS RELEVANT TO THE SHOWING OF A LIKELY SOURCE OF TAXABLE INCOME

Our main brief (pp. 34–37) demonstrates, we believe, that respondent's acceptance of bribes over a long period of time was relevant to the issues in this case. Respondent argues that the law "does not permit any inference that because a man has sinned once he will sin again" (Br. 26). But he also argues that "the Government must make an independent showing of such illegal payments to appellant during the indictment years" (Br. 35). Respondent therefore concedes that from evidence of one or more instances of bribe-taking the jury could conclude that

other bribes had been taken. And there is no rule of law or logic that this factual inference may be drawn only if the bribe occurs within the calendar year of the income, or that the fact is wholly irrelevant if the bribe occurs in a different year.

Respondent urges that the evidence of prior bribe-taking is irrelevant and immaterial since respondent had been promoted to a different assignment and that "there is no showing that the respondent's duties and responsibilities during the indictment years were such that it would be worth anyone's while to bribe him" (Br. 27). On the contrary, the evidence was that throughout most of the indictment period respondent was the one man (R. 216) who had "an inspector's duties" and that it was his duty to see that the men on the street in uniform carried out their assignments (R. 206). In short, if any policeman in Worcester was to be effectively prevented by bribery from carrying out his duty, respondent was in a position where he, too, would have to be persuaded.

Respondent wants it both ways. He argues that it is indispensible that the government introduce evidence of a likely source of income, and then argues that evidence showing an illegal source is inadmissible, since it may be prejudicial and would be supporting the conviction of one crime by evidence of another. We submit that evidence of a likely source is relevant but not indispensible, and that evidence of such a source need not be kept from the jury simply because respondent acquired income in an illegal rather than a legal way.

The evidence of bribe-taking in former years was also relevant on the issue of intent to evade taxes, the evidence showing that he paid no income tax on such bribes in the earlier years. That the judge's charge was unduly favorable to respondent in this regard (see opinion below, R. 805–806) does not make the evidence less admissible. We do not understand how this prior tax evasion could have been brought to the attention of the jury (as suggested by the court below) without calling their attention to the bribes.

2. THE ADMISSIONS WERE CORROBORATED

The court below found that "the crucial issue in this case is that dealing with corroboration of the aforementioned admissions" (R. 802). Respondent argues that there is "not an iota of corroboration in the evidence" (Br. 28). As pointed out in our main brief (pp. 37–40), we believe that this contention misconceives what is required in the way of corroboration.

Corroboration does not require independent proof of the same fact. *Smith* v. *United States,* 348 U. S. 147; *United States* v. *Calderon,* 348 U. S. 160. That respondent received graft in prior years was corroborated by the large opening net worth not explained by his salary, and by his financial history of concealment and cash transactions. The admissions were also corroborated by the independent proof of the crime, as discussed in Point I above since, we submit, the crime was established independently of the admissions as to graft.

3. THE ADMISSIONS WERE AUTHORIZED, AND HENCE COULD NOT HAVE VIOLATED THE LAWYER-CLIENT PRIVILEGE

Respondent urges this Court to overrule the findings of the trial judge, the jury, and the court of appeals and to hold that the admissions made by respondent's attorney, Garrity, were not authorized by respondent and that their disclosure violated the lawyer-client privilege (Resp. Br. 29–33). We believe that this point, which was not discussed in our main brief, is wholly without merit.

There is no question of lawyer-client privilege where information is given to an attorney for the purpose of being disclosed, nor where the attorney is authorized by the client to make the admission. Respondent agrees (Br. 32):

> Of course, if the attorney was in fact Massei's agent, any statement made by him within the scope of his agency was a statement made by Massei.

The sole issue here is thus whether there was evidence to support the factual conclusion that Garrity was authorized to make the statements for Massei.

On this issue the judge held an extensive *voir dire* (R. 306–406) during which he ruled that the statements would be admissible against respondent but that the ultimate question of authority would be for the jury (R. 370). The jury was appropriately instructed that before the admissions could be weighed against respondent they must find that Garrity was authorized to make these statements for his client (R. 732). The jury, by its verdict, indicated that they found there was authority. The court of appeals examined the

point. While expressing the view that the issue was one of law, the court found that both the judge and jury had been convinced that there was sufficient proof of agency and that there had been no prejudicial error in letting the jury pass on the question (R. 805, fn. 5). There is no occasion for this Court to consider the question of authority, which is an issue of fact on which both lower courts have passed.

Should the Court wish to consider the point, we submit that the record is clear and that the evidence amply supports the jury's conclusion:

(*a*) Authority for the admissions can be found from the fact that Garrity made one of the admissions in the presence of his client (the respondent) who participated in the conversation (R. 437).

(*b*) The entire course of conduct was for Garrity to find out the facts and tell them to the agents. During the investigation Garrity sent a number of letters disclosing facts to the Government. R. 450–460.

(*c*) At the trial respondent conceded that Garrity was authorized to send letters disclosing facts about the respondent: "Those letters there is no question about. They are admissible as admissions of the defendant, your Honor" (R. 589).

(*d*) There was also evidence that Garrity was authorized to make statements orally as well as in writing (R. 661):

> The COURT. * * * you wouldn't have gone there unless you had the authority of your client to go and speak; isn't that right?

> The WITNESS [Garrity]: I think that is correct, your Honor.

Respondent's case on this point boils down to the contention that Garrity was authorized to make statements to the Government concerning his client either in writing or orally; that if the statements were in writing they became binding admissions but that if they were oral they were somehow unauthorized disclosures violating the lawyer-client privilege. Neither the judge nor the jury were bound to accept such a strained notion of Garrity's authority.

Finally, respondent complains (Br. 12–13) that he was not allowed to introduce evidence tending to show that Garrity's statements were made in a hypothetical way and not as admissions of fact. The record shows, however, that as soon as respondent made his purpose clear he was allowed to put in all the evidence he desired on that point.[5] Evidence was introduced and the jury was instructed that the admissions could only be considered if the jury first found that they were made as statements of fact and not as assumptions or hypotheses (R. 733).

---

[5] "The COURT. Do I understand, Mr. Maguire—, * * * What you desire to get is evidence, not to show what the contentions were, but to show that there were contentions on the theory that if there were contentions by Mr. Garrity it's for the jury?

"Mr. MAGUIRE. Exactly, your Honor.

"The COURT. I'll permit it.

"Mr. MAGUIRE. That's exactly what I'm trying to get at.

"The COURT. All right. That comes within the orbit of what I said before" (R. 587–588).

CONCLUSION

For the reasons stated herein and in the Government's main brief, it is respectfully submitted that the judgment below should be reversed and the case remanded to the Court of Appeals.

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No. 885

UNITED STATES OF AMERICA,
PETITIONER,

v.

WILLIAM V. MASSEI,
RESPONDENT.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INDEX.

	Page
Questions Presented	1
Statement of the Case	2
Reasons for Denying the Writ	7
Conclusion	13

CITATIONS.

Cases:

Bracey v. *United States*, 142 F.2d 85, 87 (D.C. Cir. 1944), cert. denied 322 U.S. 762 (1944)	10
Holland v. *United States*, 348 U.S. 121, 137-138	7
Railton v. *United States*, 127 F.2d 691, 693 (5 Cir. 1942)	10
Smith v. *United States*, 348 U.S. 147	1, 9
United States v. *Adonis*, 221 F.2d 717	1, 8, 9
United States v. *Calderon*, 348 U.S. 160	1
United States v. *Chapman*, 168 F.2d 997	7
United States v. *Ford*, 237 F.2d 57	1, 2, 9
United States v. *Johnson*, 319 U.S. 503	7
United States v. *Skidmore*, 123 F.2d 604	7

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Questions Presented

1. Whether the facts in the case at bar are so different from the facts in *U. S.* v. *Ford*, 237 F.2d 57 and in *U. S.* v. *Adonis*, 221 F.2d 717 as to eliminate any conflict in the decisions. Court below so held. (Petition App. p. 33)

2. Whether the Court below misapplied this Court's decisions in *Smith* v. *U. S.*, 348 U.S. 147 and *U. S.* v. *Calderon*, 348 U.S. 160 as to corroboration of respondent's admissions.

3. Whether the Court below's ruling on the irrelevancy of the respondent's admissions conflicted the decision in *U. S.* v. *Ford*, 237 F.2d 57 on this point.

4. Whether the presence of other meritorious arguments show the decision below to be correct without regard to the question sought to be raised by the Petition and as a result this Court cannot reach the point of alleged conflict.

Statement of the Case

Respondent was indicted and convicted by a jury of tax evasion for the years 1946 through 1950. The Government's case was based on the net worth method of proof.

Respondent joined the Worcester Police Force as a patrolman in 1923 (R. 200). From *April 20, 1932 to March 1, 1933*, he was assigned as a plainclothes officer to the vice squad (R. 204, 205). He was again on the vice squad from *January 10, 1938 to September 11, 1939*. As a sergeant on *January 6, 1940* he was the head of the vice squad which continued *until June 1, 1943* (R. 205, 206). Thereafter, until his retirement on December 30, 1951, respondent had no connection with the vice squad. His duties were personnel officer wherein he inspected the physical plant and saw that the uniformed patrolmen carried out their assignments. He was also assigned to the license board where he investigated licenses for hackneys, gas stations and parking lots. He had nothing to do with taverns, liquor stores or liquor interests (Defendant's Exhibit B, R. 206). Respondent's salary for the years 1946, 1947, 1948, 1949 and 1950 was $2850.00, $3300.00, $3300.00, $4080.00 and $4080.00, respectively (R. 223, 224).

The evidence showed the following increases in respondent's net worth: 1946—$27,265.38; 1947—$9,991.64; 1948—$5,533.22; 1949—$9599.72; and 1950—$36,033.31 (Govern-

ment's Exhibit 44, R. 775). On these increases additional taxes were allegedly owing as set forth in Government's Exhibit 45 (R. 777).

Respondent according to the Government had a net worth on December 31, 1945 of $61,080.73. He was given no credit for any cash or currency on hand (Government's Exhibit 44, R. 775).

No tax was paid from 1921 through 1939 (R. 115, 116) but as a municipal employee his salary was exempt, this was in addition to the general $2000.00 exemption in those years (R. 119). Living expenses of respondent in 1946 as fixed by the Government were $1313.40. (Government's Exhibit 44, R. 775).

In its answer to the respondent's bill of particulars the Government specified that the source of the alleged income for each of the years in question was illegal payments to respondent as a police officer by many persons engaged in illegal activities (R. 12, 13).

No evidence of this was introduced.

To satisfy its burden of proof of a likely source of currently taxable income to which the increases in net worth could be attributed, the Government instead introduced the following evidence.

One conversation according to the testimony of the investigating agents, occurred in the presence of the defendant. On November 27, 1941, Garrity, attorney for the taxpayer, arranged for the opening by the respondent of a safe deposit box which he had maintained in a bank in Westerly, Rhode Island, so that the agents might examine its contents. It was the only time the agents had any conversation with the respondent (R. 553). While Hurst was dictating an inventory of the papers in the box to Agent Calatrello, who was the Revenue Agent assigned to the investigation, Hurst turned to the respondent and asked him where all the money came from with reference to his

net worth; the respondent answered, "from a number of different people at different times many years ago", whereupon Garrity interrupted and stated that the respondent got the funds during prohibition days from letting liquor trucks roll through Worcester; the respondent then picked up the conversation and said he got the funds in the nature of a gift and didn't think they were taxable (R. 436-7, 600).

This testimony was admitted into evidence over the strenuous objection of the respondent on the grounds that (a) it was outside the scope of the bill of particulars filed by the Government; (b) it was irrelevant; (c) it was immaterial, and at the conclusion of the testimony, respondent advanced the additional ground that (d) the statements were wholly uncorroborated by other evidence.

On three other occasions in the absence of the respondent, according to prosecution witnesses, Garrity told them that the money spent by the respondent from 1946 to 1950 came from graft taken by him during prohibition days and while he was on the vice squad between 1933 and 1943. The occasions were as follows: (a) On an unspecified date in November or December, 1951, to Hurst in his office (R. 486); (b) on January 24, 1952, to Hurst in his office (R. 461, 471); and (c) on May 20, 1952, to Hurst and Attorney Isber of the Treasury's District Counsel's office in Mr. Isber's office at a conference at which Garrity was endeavoring to persuade Attorney Isber to recommend against criminal prosecution of the respondent (R. 484-487, 579-581).

The respondent objected to the admissibility of these statements of the attorney on several grounds: (a) The attorney's statements were not made as statements of fact but hypothetically in the course of arguing the innocence of his client; (b) that the respondent never authorized the attorney to make the statements in question; (c) that their admission in evidence would violate the attorney-client privilege which the respondent had never waived; (d) that

they were outside the scope of the bill of particulars filed by the Government; (e) that they were irrelevant; (f) that they were immaterial, inflammatory and highly prejudicial to the respondent. At the conclusion of the evidence, upon moving to strike the testimony, the respondent advanced the additional ground (g) that the statements were wholly uncorroborated by other evidence.

Government witnesses also testified that during the conference of May 20, 1952 with Isber, respondent's attorney stated that in February 1949 the respondent obtained "X dollars, after the death of his father, who had saved a lot of cash" from a partnership interest in a tavern which was engaged in the illegal sales of liquor (R. 491, 581). F. Joseph Donohue, Register of Probate for Worcester County, testified that the petition for probate of the will and the will itself of Pilade Massei, respondent's father, had been duly filed and allowed but no inventory or account had ever been filed. John Bianchi, executor of the will, testified that he had filed no inventory and that the only asset of the estate which he could find was a three tenement house in Worcester. It was established that the respondent in 1949 had received only a one-half interest in the three tenement house from his father's estate. As to this evidence, the Government's petition for certiorari is inaccurate, at page 4, in stating that the defendant, except for the one-half interest in the house, "did not receive any gifts or inheritances at any time." There was no evidence as to whether the defendant did or did not receive gifts or inheritances before 1946.

As to this evidence, the Court below held that it was inadmissible on the grounds that the admissions were not corroborated, and were irrelevant and immaterial (Government Petition, App. 23, 27). Since there was no other evidence of likely source, the Court below ruled that re-

spondent's motion for a verdict of acquittal should have been granted.

In addition respondent urged on the Court below several other errors which would justify reversal and which the Court below did not touch on. Demands of brevity will not permit any more than a brief recitation of these errors with appropriate reference to the Record or Respondent's brief below. These errors are as follows:

1. The Court erred in refusing to allow appellant to be heard and offer evidence in support of his Motions to Dismiss the indictment because of improper presentation of improper evidence to the Grand Jury and to inspect the Grand Jury minutes. (Appellant's brief, pp. 19-21).

2. The appellant was denied a speedy trial. (Appellant's brief, pp. 21-25)

3. Alleged admissions of respondent's attorney were privileged and unauthorized. (Appellant's brief, pp. 25-28)

4. The Court should have decided the question as to the attorney's authority and erred in submitting it to the Jury. (Appellant's brief, pp. 28-29)

5. The Court erroneously excluded testimony offered by the appellant to prove that his attorney's alleged admissions were rhetorical and not factual. (Appellant's brief, pp. 29-31)

6. The Court's charge to the Jury misstated the law in many vital particulars as to the net worth method of proving tax evasion and the admissibility of the attorney's alleged admissions. (Appellant's brief, pp. 36-41)

7. A fixed starting point was not established. (Appellant's brief, p. 43)

Reasons for Denying the Writ

I. THE DECISION OF THE COURT BELOW DOES NOT CONFLICT IN ANY WAY WITH THE DECISION IN *U. S.* v. *Ford* (2nd Circuit), 237 F.2d 57 AND THE DECISION IN *U. S.* v. *Adonis* (3rd Circuit), 221 F.2d 717.

In *Holland* v. *U. S.*, 348 U.S. 121, 137-138, this Court held that there must be some independent showing of a likely source of income to account for the increases in net worth. Under the cases this "likely" source may be proved in one of two ways.

(a) By showing that the taxpayer is in an income-producing business from which the income could have been derived. *Holland* v. *U. S.*, 348 U.S. 121 (hotel business proven to be capable of producing much more income than was reported); *U. S.* v. *Johnson*, 319 U.S. 503 (concealed ownership of taxpayer of gambling houses).

(b) By evidence of specific items of unreported income. In *U. S.* v. *Chapman*, 168 F.2d 997, the Government showed a possible source of income by testimony that during the prosecution period seven meat peddlers paid overceiling prices for purchases from the defendant's company, paying the excess in currency either to Chapman direct or to his salesmen. In *U. S.* v. *Skidmore*, 123 F.2d 604, there was evidence that bookies paid monthly sums to the defendant in currency for "profection".

In the *Ford* and *Adonis* cases, the Courts have carved two exceptions to the rule requiring the Government to prove a likely source. First of all, both cases are clearly distinguishable on the facts from the case at bar. In the *Ford* case, the Government introduced no direct evidence

that the defendant had ever received a bribe. Plentiful evidence, however, was introduced which disclosed that during the prosecution years the defendant had "opportunities" for graft *flowing from his position in charge of the investigation for vice.* In the case at bar, the Government introduced no evidence bearing on the prosecution years, no evidence of "opportunities" for graft, and most significant the respondent was not on the vice squad after 1943 but performed administrative duties on the police force.

In the *Adonis* case, the facts also are clearly distinguishable. Adonis had been indicted for tax evasion for the year 1948. The Government proceeded on the net worth theory. In 1951, Adonis testified in a judicial proceeding in Holland and was questioned as to the increase in his net worth in the year '48. In this judicial proceeding, Adonis offered five different sources which together made up the total increase in net worth. At the tax evasion trial, the Government offered in evidence Adonis' testimony in this Holland judicial proceeding and then proceeded to prove that his explanations as to source were fabrications. The Court of Appeals ruled that this calculated fabrication was sufficient evidence from which the jury could infer that the source of his increase in net worth was taxable income. In the case at bar, respondent's counsel allegedly stated that respondent had received from his father's estate "X dollars" according to one Government witness (R. 581), and the other Government witness stated that no figure was mentioned (R. 491). Clearly, such a casual admission by respondent's counsel did not constitute a "calculated fabrication" such as was made in the *Adonis* case.

Regardless of whether the cases are distinguishable on their facts, the evidence that the Government did introduce on the question of source is inadmissible. The Court below adopted two of the reasons advanced by respondent against

its admissibility, namely, the admissions were uncorroborated and that they were irrelevant. Consequently, there is not an iota of admissible evidence in the record as to source. This moved the Court below to say at page 33 of the Government's Petition Appendix as follows:

> "While we have mentioned the *Adonis* case, above, and the Second Circuit *Ford* case, earlier in this opinion, we do not mean to infer that we either approve or disapprove of the exceptions to the necessity of proving likely source that these holdings seem to have established."

In short since the rules of evidence required the exclusion of the admissions, the Court below never reached the questions raised by the *Ford* and *Adonis* decisions.

II. THE COURT BELOW CORRECTLY APPLIED THE DECISION IN *Smith* v. *U. S.*, 348 U.S. 147 AND *U. S.* v. *Calderon*, 348 U.S. 160 IN RULING THAT RESPONDENT'S ADMISSIONS WERE NOT CORROBORATED.

In the *Smith* case, this Court held that corroboration may be one of two kinds.

(a) Independent evidence to bolster the admission itself.

(b) Independent evidence concerning the defendant's conduct during the prosecution years which tends to establish the crime as a whole.

As the Court below correctly noted, there was no evidence of actual graft taking or even opportunity for graft taking which could serve as corroboration of the admissions. The fact that the defendant was a police officer and on the vice squad in pre-indictment years is not corrobora-

tion of the admission. Further, the assets acquired by the respondent in the years prior to the indictment do not help the Government on this point as there was no evidence that he had not received gifts or inheritances in these pre-indictment years. Further, his salary as a municipal employee from 1921 through 1939 was tax exempt and he had in addition the general $2000.00 exemption afforded all taxpayers. On the other hand the living expenses of the respondent in 1946 as fixed by the Government was only $1313.40.

As to independent evidence tending to establish the crime as a whole, the Court below correctly ruled that "evidence of unexplained net worth increases does not either bolster the admissions of likely source or establish this element of the crime independent of the admissions, for that evidence, independent of the admissions, does not tend to prove from *where* the net worth increases likely issued." (Govt. Petition Appendix, p. 31)

III. The Ruling of the Court Below that the Admissions Were Inadmissible as Irrelevant Was Correct and Does Not Conflict with the Decision in *U. S.* v. *Ford*, 2nd Cir. 237 F.2d 57.

The Court below correctly stated the law as follows:

> "The general rule is that, upon the trial of an accused person, evidence of another offense, wholly independent of the one charged, is inadmissible." *Bracey* v. *United States*, 142 F.2d 85, 87 (D.C. Cir. 1944), cert. denied 322 U.S. 762 (1944).
>
> "In this connection it was stated in *Railton* v. *United States*, 127 F.2d 691, 693 (5 Cir. 1942):
>
> "' • • • It is logical to conclude, and very apt to be concluded, that because a man was dishonest once

> he will steal again. It is certainly 'more probable' that a crooked official did steal than if he were an upright one. Yet our law forbids these very premises. It cannot be shown that the accused has committed other similar crimes to show that it is probable he committed the one charged. * * * ' " (Govt. Petition Appendix, p. 26)

Further, the Court held that these admissions were irrelevant due to the remoteness in time from the indictment years and due to the change in respondent's duties as a police officer. (Govt. Petition Appendix, p. 27)

In the *Ford* case, the defendant on appeal argued that it was possible that he received graft in pre-indictment years and so built up a cash hoard. The Court held that if it were assumed that the defendant actually profited through graft prior to the indictment years, since his duties on the vice squad did not change and there was proof of opportunities for graft in the indictment years, there existed a likely source of unreported taxable income.

In the case at bar, respondent at all times has strenuously denied the truth of the admissions. The admissions were made by respondent's attorney in a hypothetical and argumentative way while trying to convince Treasury officials that the case should be settled civilly. Respondent's attorney testified that he had no knowledge of his client's activities prior to the indictment years. Further, and most significant, the duties of the respondent in pre-indictment years was totally different than his duties as personnel officer and license board investigator which was his job during the years under indictment. In addition, most of the admissions pertain to prohibition days, which the Court below held being prior to 1943 was too remote in time from the indictment years.

IV. Other Meritorious Arguments Advanced by the Respondent Show the Decision Below To Be Correct Without Regard to the Questions Sought To Be Raised by the Petitioner.

As already noted on page 6 of respondent's Statement of the Case, the respondent raised several additional meritorious arguments which show that the decision of the Court below was correct. The Court below in its opinion adopted two of the arguments advanced, namely, that the admissions were uncorroborated and that they were irrelevant. As to the other arguments advanced, the respondent respectfully submits that they are equally meritorious and show clearly that the decision of the Court below was correct.

The important fact as regards the petition is that the Court below never reached the points of alleged conflict as set out in the Government's petition. The sole evidence of source introduced by the Government was the admissions. Without these admissions, the Government had no case. As an evidentiary matter, the admissions are inadmissible on several grounds. Two of the grounds, corroboration and relevance, are discussed and adopted by the Court below in its opinion. Either ground would be sufficient to exclude the admissions. In addition, the respondent argued other grounds for reversal of the conviction, mostly of an evidentiary nature. It is clear that this Court cannot reach whatever points of alleged conflict the Government seeks to raise in its petition. The Court below reversed the conviction on the grounds that the admissions were improperly admitted. This decision in no way conflicts with the decisions in the *Ford*, *Adonis*, *Smith* and *Calderon* cases. For the reasons advanced by the Court below in its opinion, and for the other reasons argued by respondent in his brief, the admissions should not have been admitted into evidence.

Conclusion

For the reasons stated, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

RICHARD MAGUIRE
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THOMAS J. CARENS
Of Counsel

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JOHN T. FEY, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1957.

No. 98.

UNITED STATES OF AMERICA,
PETITIONER,

v.

WILLIAM V. MASSEI,
RESPONDENT.

BRIEF FOR THE RESPONDENT

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TABLE OF CONTENTS

	Page
Opinion Below	1
Jurisdiction	1
Questions Presented	2
Statute Involved	3
Statement	3
The Evidence	3
The Treasury Investigation	4
Evidence of Respondent's Net Worth	8
Admissions as to Source	9
The Attorney's Testimony	13
The Charge to the Jury	14
Conclusion of the Trial	17
Summary of Argument	18
Argument	20
I. Evidence Proving No Nontaxable Receipts Does Not Support the Inference that the Increases in Net Worth Must Be Attributable to Unreported Taxable Income	20
II. There Was No Evidence of a Deliberate Fabrication Indicating a Consciousness of Guilt	22
III. The Court Below Was Correct in Holding that the Trial Judge Should have Excluded Extra-Judicial Admissions by Respondent that He Took Graft in Pre-Indictment Years as Irrelevant and Immaterial	23
IV. The Court Below Was Correct in Holding that the Alleged Admissions of Respondent and His Attorney Were Uncorroborated	27

Page

V. The Trial Court Erred in Failing to Exclude the Alleged Admissions by Respondent's Counsel That Respondent Had Taken Graft in the Pre-Indictment Years On the Grounds That it Violated the Attorney-Client Privilege and That Counsel Was Not Authorized to Make Extra-Judicial Admissions in Aid of A Criminal Prosecution of His Client 29

VI. The Court Below Was Correct in Holding that Proof of a Likely Source of Unreported Income Is an Indispensable Element of a Net Worth Case 33

Conclusion 37

Table of Citations.

Cases

American Fur Co. v. *United States,* 2 Pet. 358, 364 32
Banks v. *United States,* 204 F.2d 666 (C.A. 8) 31
Beard v. *United States,* 59 F.2d 940 (C.C.A. 8) 32
Brownell v. *Tide Water Associated Oil Co.,* 121 F.2d 239 (C.C.A. 1) 32
Dastagir v. *Dastagir,* 241 P.2d 656 32
Gosney v. *Metropolitan Life Insurance Co.,* 114 F.2d 649 (C.C.A. 8) 32
Gould v. *United States,* 255 U.S. 298 32
Hicks v. *Naomi Falls Mfg. Co.,* 138 N.C. 319, 50 S.E. 703 30
Himmelfarb v. *United States,* 175 F.2d 924 (C.A. 9) 31
Holland v. *U. S.,* 348 U.S. 121 18, 19, 20, 22, 34, 35, 36
Horseshoe Mining Co. v. *Miners' Ore Sampling Co.,* 147 Fed. 517 (C.C.A. 8) 31
Humble Oil & Refining Co. v. *Sun Oil Co.,* 191 F.2d 705 (C.A. 5) 31
Hunt v. *Blackburn,* 128 U.S. 464 31

Page

Loomis v. *New York, New Haven & Hartford Railroad*, 159 Mass. 39, 44 31
Lovely v. *United States*, 169 F.2d 386 25
Massei v. *United States*, 241 F.2d 895 1
Opper v. *U. S.*, 348 U.S. 84 27
Pickert v. *Hair*, 146 Mass. 1, 5 30
Proctor v. *Old Colony Railroad*, 154 Mass. 251 30
Railton v. *United States*, 127 F.2d 691 24, 26
Sang Soon Sur v. *United States*, 167 F.2d 431 25
Saunders v. *McCarthy*, 8 Allen 42, 45 30
Smith v. *U. S.*, 348 U.S. 147 27
Standard Fire Insurance Co. v. *Smithhart*, 183 Ky. 679 31
Stein v. *First National Bank of Sarcoxie, Mo.*, 298 Fed. 36 (C.C.A. 8) 31
Steiner v. *United States*, 134 F.2d 931 (C.C.A. 5) 31
Thomas v. *Commissioner*, 232 F.2d 520 35
United States v. *Adonis*, 221 F.2d 717 2, 18, 19, 20, 22, 23, 26, 33, 35, 36
United States v. *Calderon*, 348 U.S. 160 27
United States v. *Chapman*, 168 F.2d 997 34
United States v. *Costello*, 221 F.2d 668, 670, 671 20
United States v. *Ford*, 237 F.2d 57 20, 33, 35, 36
United States v. *Johnson*, 319 U.S. 503 34
United States v. *Shibby*, 112 F. Supp. 734 (D.C., S.D., Calif.) 31
United States v. *Skidmore*, 123 F.2d 604 34
United States v. *United Shoe Machinery Corp.*, 89 F. Supp. 357 (D.C., Mass.) 32
Weeks v. *United States*, 232 U.S. 383 32
Wild v. *Paysen*, 7 F.R.D. 495 (D.C., S.D., N.Y.) 31
Wilson v. *Turner*, (1808), 1 Taunt. 398, 127 Eng. Repr. 888 30

Miscellaneous

	Page
26 U.S.C. 145(b)	33
Wigmore on Evidence, 3rd Ed., 1940, Sec. 304	28
4 Wigmore on Evidence, Secs. 1061 and 1063	30

In the Supreme Court of the United States

OCTOBER TERM, 1957.

No. 98.

UNITED STATES OF AMERICA,
PETITIONER,

v.

WILLIAM V. MASSEI,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT

Opinion Below

The opinion of the Court of Appeals (R. 795-810) is reported at 241 F.2d 895.

Jurisdiction

As recited in the Government brief.

Questions Presented

1) Whether in a tax evasion prosecution based on the net worth method, an increase in net worth plus negation of sources of nontaxable income is sufficient basis for a jury to find that the increase alleged is income.

2) Whether there was any evidence amounting to the "calculated fabrication" as found in *U. S.* v. *Adonis*, 221 F.2d 717.

3) Whether the court below erred in holding that the trial judge should have excluded alleged admissions by respondent and respondent's counsel that he had taken graft in pre-indictment years on the grounds of irrelevance and immateriality.

4) Whether the court below erred in holding that the trial judge should have excluded alleged admissions by respondent and respondent's counsel that he had taken graft in pre-indictment years on the grounds that the admissions were not corroborated.

5) Whether the trial judge should have excluded alleged admissions by respondent's counsel that respondent had taken graft in the pre-indictment years on the grounds that it violated the attorney-client privilege and that counsel was not authorized to make extra-judicial admissions in aid of a criminal prosecution of his client.

6) Whether the court below erred in holding that in a tax evasion prosecution based on the net worth method, proof of a likely source of the respondent's net worth increases is an indispensable element of the Government's burden.

Statute Involved

As recited in the Government brief.

Statement

The statement as it appears on page 2 through 4 in the Government brief is correct. In addition, however, respondent would like to point out the following facts:

1. The only evidence in the case introduced by the Government as to source were the alleged admissions of respondent on one occasion and respondent's counsel on three other occasions. It is clear that without evidence of these alleged admissions, the Government has failed to make out a case.

2. The alleged admissions are inadmissible for the following reasons:

(1) The alleged admissions are irrelevant and immaterial;

(2) The alleged admissions are uncorroborated.

(3) The alleged admissions by respondent's counsel are incompetent as being without authority and in violation of the attorney-client relationship.

The Evidence

Respondent joined the Worcester Police Force as a patrolman in 1923 (R. 200). From April 20, 1932 to March 1, 1933, he was assigned as a plainclothes officer to the vice squad (R. 204, 205). He was again on the vice squad from

January 10, 1938 to September 11, 1939. As a sergeant on January 6, 1940 he was the head of the vice squad which continued until June 1, 1943 (R. 205, 206). Thereafter, until his retirement on December 30, 1951, respondent had no connection with the vice squad. His duties were as personnel officer wherein he inspected the physical plant and saw that the uniformed patrolmen carried out their assignments. He was also assigned to the license board where he investigated licenses for hackneys, gas stations and parking lots. He had nothing to do with taverns, liquor stores or liquor interests (Defendant's Exhibit B, R. 206). Respondent's salary for the years 1946, 1947, 1948, 1949 and 1950 was $2850.00, $3300.00, $3300.00, $4080.00 and $4080.00, respectively (R. 223, 224).

The evidence showed the following increases in respondent's net worth: 1946—$27,265.38; 1947—$9,991.64; 1948—$5533.22; 1949 — $9599.72; and 1950 — $36,033.31 (Government's Exhibit 44, R. 775). On these increases additional taxes were allegedly owing as set forth in Government's Exhibit 45 (R. 777).

Respondent according to the Government had a net worth on December 31, 1945 of $61,080.73. He was given no credit for any cash or currency on hand (Government's Exhibit 44, R. 775).

No tax was paid from 1921 through 1939 (R. 115, 116) but as a municipal employee his salary was exempt, this was in addition to the general $2000.00 exemption in those years (R. 119). Living expenses of respondent in 1946 as fixed by the Government were $1313.40 (Government's Exhibit 44, R. 775).

THE TREASURY INVESTIGATION

On November 7, 1951, the Intelligence Unit of the Treasury opened an investigation of the respondent's tax re-

turns for the years 1945 to 1950, inclusive. Special Agent Hurst, to whom the case was assigned, thereupon notified the respondent, who engaged the services of counsel. Respondent's counsel went to the offices of the Intelligence Unit and, in Hurst's absence, arranged with Hurst's superior, group chief Ierarde, for a conditional payment to the Treasury by the respondent which would deter the Treasury from making a jeopardy assessment against the respondent and would keep the investigation from being publicized. A few days later, the respondent deposited $84,000 in escrow, in the Treasury's so-called suspense account, against whatever liability for taxes might ultimately be assessed against him.

At about the time of said deposit, respondent's counsel delivered a power of attorney to some treasury representative. Hurst noted in his diary that a power of attorney had been filed, but couldn't recall having seen it, the contents of it or whether it was signed by the Respondent (R. 325-6). Counsel testified that it was his custom to file a power of attorney (R. 645) when employed by a taxpayer under investigation, but he had no memory of having done so in this case. No witness had any specific recollection of a power of attorney. Witness Ryan, chief of the Treasury audit division, testified that his division has custody (R. 572) of powers of attorney but that it could not locate any filed on behalf of the respondent.

The provisions of a Treasury Department circular, No. 230 (26 C.F.R., sec. 601.4) which was in effect at the time were admitted in evidence. Excerpts from said regulation are set forth at pages 308-321 and 424-427 of the record. The circular requires that a power of attorney shall be filed in every case, but that it need not be any particular form. There is no official or recommended form, except that it must have been executed before a notary public or witnessed by two disinterested individuals. If

the power of attorney authorizes specific acts, the authority delegated will be considered limited to those acts.

Respondent's counsel undertook to furnish the investigating agent with complete information as to the assets and expenditures of the respondent during the period under investigation. He submitted a series of letters (R. 450-460), (Exhibit 39, R. 340) stating the costs, acquisition dates and sales of assets of the respondent and describing the nature of various payments made by the respondent and his wife. He furnished the agent with a breakdown of the interest and dividend income received by the respondent (Exhibit 43, R. 434). He procured cancelled checks, bank books and photostats of bank records and delivered them to the agent (Exhibit 40, R. 479). He arranged for the examination by Hurst and a Revenue Agent working with Hurst of the contents of safe deposit boxes maintained by the respondent in Worcester and in Westerly, Rhode Island. He sent letters to Hurst answering requests for information made by Hurst during oral discussion of the case. He obtained for Hurst "substantially everything" that Hurst asked for and was "very cooperative" (R. 333, 444, 534). The transmittal of documents between the investigator and the attorney was generally covered by receipts (e.g. Exhibits 40, 41 and 42).

Hurst and respondent's counsel conferred on numerous occasions. From November 16 to 30, inclusive, they met seven times (R. 327-332). They conferred frequently through April, 1952. During the period from November, 1951 to April, 1952, Hurst made diary entries pertaining to the Massei investigation on 50 dates and the majority of these entries referred to information sought from or furnished by counsel. Many diary entries referred to conversations between the investigator and the attorney, in the absence of the respondent. The admissibility of Hurst's

testimony as to these conversations was one of the chief issues at the trial.

Hurst repeatedly asked respondent's counsel to bring the respondent into the Treasury office for a sworn or oral statement and let him look at a list of routine questions, but the attorney refused (R. 335, 567). On January 24, 1952, the agent told the attorney that he thought he would recommend criminal prosecution.

The investigation was completed soon thereafter and the file was forwarded to the office of the District Counsel of the Treasury, where it was assigned to Attorney Isber. His duty was to review the file and pass on the legal sufficiency of the evidence contained therein to sustain a criminal conviction (R. 582). It was the District Counsel's practice to afford taxpayers and their counsel an opportunity to confer with the attorney to whom the case had been assigned (R. 574). Respondent's counsel requested a conference and on May 20, 1952, he appeared before Isber and endeavored to persuade him that the case should not be forwarded to the Justice Department for criminal prosecution (R. 528). Hurst attended this conference. The respondent did not. The conference lasted about an hour. The participants sat around Isber's desk. Respondent's counsel spoke extemporaneously. No procedural formalities were observed. There was no stenographer present. Isber made brief notes (R. 582-3, 394-399). The admissibility of testimony by Isber and Hurst as to statements made by respondent's counsel at this conference was one of the chief issues at the trial.

The file was forwarded to the Justice Department and the respondent was indicted for tax evasion on February 16, 1953. The indictment contained five counts and charged the respondent with having filed fraudulent tax returns for each of the calendar years 1946 to 1950, inclusive.

The jury was empanelled April 2, 1956. On April 3,

1956, after an unrecorded lobby conference (R. 61), the Court noted that some evidential difficulties had arisen and he continued the proceeding until the following morning to permit counsel to research the law. Respondent's request for a continuance of ten days (R. 62, 65) on the ground that the evidence which the Government proposed to offer went beyond the bill of particulars was denied (R. 68). When the proceedings resumed, on April 4th, the respondent filed a motion to suppress (R. 20, 80), which the Court ordered impounded and on which it reserved decision (R. 88). The respondent's request that he be permitted to offer evidence in support of the motion was denied (R. 80, 81). The evidence which the respondent sought to suppress was statements allegedly made by his attorney in his absence during conversations with Treasury officials.

EVIDENCE OF RESPONDENT'S NET WORTH

The first three days of the trial were devoted principally to evidence of the dates of acquisition and costs of assets purchased by the respondent during the prosecution period and the balances in various bank accounts. With minor exceptions this information was originally furnished to Hurst by the respondent's attorney in a series of letters (Exhibits 39, R. 450-460). The respondent's brother Edward testified that the respondent had loaned him $4,500 in 1950; that he and the Respondent each inherited a half-interest in a house when their father died in 1949; that he received nothing else from the father's estate; that he was 20 years younger than his brother, the respondent (R. 250-255). He was not asked the value of the two-family house and it does not appear elsewhere.

The testimony during the first three days formed the basis of Agent Hurst's later computation of the respond-

ent's alleged net worth on the last day of each year from 1945 to 1950, inclusive (R. 497). This computation was written on a blackboard (R. 497-504) which the agent used during his summarizing testimony. The contents of the blackboard appear in Exhibit 44 (R. 775). The respondent's living expenses entered in the computation were also based principally on information furnished by the respondent's attorney (R. 507, 509).

ADMISSIONS AS TO SOURCE.

The balance of the testimony, which lasted for six days, was given by Treasury officials and respondent's attorney. Most of it concerned the Government's contention that the respondent had "admitted through his attorney" (R. 293) that he had taken bribes from 1923 to 1943. This evidence was admitted over the respondent's objections and was relied upon by the prosecution to establish the source from which it was likely that the respondent derived his allegedly unreported income during the prosecution period beginning in 1946.

One conversation according to the testimony of the investigating agents, occurred in the presence of the defendant. On November 27, 1941, respondent's counsel arranged for the opening by the respondent of a safe deposit box which he had maintained in a bank in Westerly, Rhode Island, so that the agents might examine its contents. It was the only time the agents had any conversation with the respondent (R. 553). While Hurst was dictating an inventory of the papers in the box to Agent Calatrello, who was the Revenue Agent assigned to the investigation, Hurst turned to the respondent and asked him where all the money came from with reference to his net worth; the respondent answered from a number of different people at different times many years ago, whereupon respondent's

counsel interrupted and stated that the respondent got the funds during prohibition days from letting liquor trucks roll through Worcester; the respondent then picked up the conversation and said he got the funds in the nature of a gift and didn't think they were taxable (R. 436-7, 600).

On three other occasions in the absence of the respondent, according to prosecution witnesses, respondent's counsel told them that the money spent by the respondent from 1946 to 1950 came from graft taken by him during prohibition days and while he was on the vice squad between 1933 and 1943. The occasions were as follows: (a) On an unspecified date in November or December, 1951, to Hurst in his office (R. 486); (b) on January 24, 1952, to Hurst in his office (R. 461, 471); and (c) on May 20, 1952, to Hurst and Attorney Isber of the Treasury's District Counsel's office in Mr. Isber's office at a conference at which respondent's counsel was endeavoring to persuade Attorney Isber to recommend against criminal prosecution of the respondent (R. 484-487, 579-581).

The respondent objected to the admissibility of these statements of the attorney on several grounds: (a) The attorney's statements were not made as statements of fact but hypothetically in the course of arguing the innocence of his client; (b) that the respondent never authorized the attorney to make the statements in question; (c) that their admission in evidence would violate the attorney-client privilege which the respondent had never waived; (d) that they were outside the scope of the bill of particulars filed by the Government; (e) that they were irrelevant; (f) that they were immaterial, inflammatory and highly prejudicial to the respondent. At the conclusion of the evidence, upon moving to strike the testimony, the respondent advanced the additional ground (g) that the statements were wholly uncorroborated by other evidence.

The Court held voir dire hearings on the admissibility of the testimony to be given by the witnesses Hurst and Isber (R. 306-405), after a preliminary discussion with counsel as to the advisability of such hearings, (R. page 293, line 28). The evidence at the voir dires consisted of the Treasury regulations governing powers of attorney and testimony as to respondent's counsel's conduct and statements. There was no evidence of the contents of any power of attorney filed by respondent's counsel and no showing that the Treasury regulations had been complied with. There was no evidence regarding the respondent's acts or statements, with the following exception: (a) The episode in the safe deposit vault in the Rhode Island bank, at to which Hurst testified, "I believe I asked him, (the respondent), in substance, where all the money came from with reference to his net worth, and he answered from a number of different people at different times, and respondent's counsel cut in and that was the end of that" (R. 330); (b) the respondent signed "consent waivers" extending the statute of limitations on the assessment of any civil liability for 1948 after the appropriate forms had been submitted to respondent's counsel for transmittal to his client (R. 336-338); (c) in November, 1951, the respondent, as a result of arrangements made by respondent's counsel, deposited $84,000 in escrow in the Treasury suspense account (R. 355-358).

Ultimately, the question of the admissibility in evidence of respondent's counsel's statements, including the issue of the scope of his authority, was left to the jury in the Court's charge (R. 732). The judge first ruled that the question of respondent's counsel's authority was one of law which he would decide (R. 295-297), but he changed his mind over night (R. 467-8). After the voir dire on Hurst's testimony, he made a ruling to which he referred

frequently during the balance of the trial, stating that the question of authority would ultimately be for the jury (R. 370). The Court affirmed this ruling (R. 373) when the purpose of proceeding with a voir dire in connection with Isber's prospective testimony became doubtful to counsel (R. 373, 377) and in several statements to the jury during the testimony (R. 432, 464, 487, 551).

On the issue of admissibility of the attorney's statements, the jury was given much evidence irrelevant to the substantive issues. For examples, (a) several paragraphs of Prentice-Hall Tax Service dealing with the enrollment of attorneys and powers of attorney (R. 424-427); (b) that respondent's counsel told Hurst that he would bring the respondent to Hurst's office for a sworn statement (R. 432-3); (c) that respondent's counsel told Hurst that the respondent probably would be willing to pay the tax deficiencies found by the Revenue Agent (R. 471); (d) that respondent's counsel submitted a list of the respondent's real estate holdings which omitted a parcel allegedly owned by the respondent and told Hurst that he knew nothing about the parcel (R. 450, 453, 476).

Conversely, with regard to the respondent's position (R. 488, 489) that his attorney's admissions were rhetorical and not factual, the Court ruled that it would pass upon the nature of the statements (R. 367) and excluded much testimony tending to support the respondent's position. The Court "made it clear that I wasn't going to allow contentions and arguments to go in" (R. 468) and stated, "If I find something that is argument, I am going to exclude it" (R. 469). On its own motion, and over defense counsel's objection, the Court excluded testimony which would have shown the context in which the attorney's alleged admissions were made (R. 466-470). On its own motion, the Court screened Hurst's testimony and ex-

cluded evidence of respondent's counsel's having discussed hypotheses with Isber (R. 492). When defense counsel, cross-examining Hurst on the important fact that Hurst's extensive diary entries made no mention of respondent's counsel's alleged admissions as to graft and bribe taking, asked whether or not the omissions were due to Hurst's considering respondent's counsel's statements "just lawyer's talk and contentions", the Court excluded the question and stated, "I don't want that question asked again in any form" (R. 563-4).

THE ATTORNEY'S TESTIMONY

Respondent's counsel testified that all statements made by him to Treasury representatives as to his client's taking graft in prohibition days and while on the vice squad were hypothetical, made in the course of arguing that, under various decisions, the prosecution would have the burden of excluding all hypotheses consistent with his client's innocence (R. 623-631, 635-6). During cross-examination by the Court (R. 666-671), respondent's counsel testified that his position apparently had been misunderstood by Attorney Isber. He testified that he never had any conversation with the respondent relative to his activities as a police officer during prohibition days or while on the vice squad (R. 632). The Court excluded his offered testimony that he had no personal knowledge of the respondent's activities during prohibition days or while on the vice squad (R. 632). Respondent's counsel denied that either he or the respondent had made the statements attributed to them by the agents on the only occasion when the agents were in the respondent's presence, at the safe deposit vault of the Rhode Island bank (R. 637-640).

THE CHARGE TO THE JURY

In instructing the jury on the law of agency (R. 732-734), the Court stated that the attorney's authorization by the respondent to make the statements at issue could be implied from circumstances and implications. It charged that the jury could predicate the conclusion that there was an authorization merely on the testimony pertaining to the episode at the safe deposit vault of the Rhode Island bank. It charged that on the question of respondent's counsel's authority, the jury should consider Hurst's method of approach and investigations and Hurst's talks with respondent's counsel.

In instructing the jury on the net worth method of proving tax evasion, the Court said, (R. 738):

> "This is the position which the Government maintains as the basis for its prosecution. It is predicated upon the proposition that if a man accumulates or spends more in a taxable year than his reported income, and if it is established that he (1095) did not get these funds by loans, inheritance, gifts, savings or the sale of some property which he owned, it would seem that he must have received income."

He further said, (R. 744):

> "but if you do not believe these assertions by the defendant through his attorney as to source, then I must charge you that as to the years 1949 and 1950 you may infer that the monies reflected by the net worth evidence came from a taxable source."

The respondent duly excepted to this charge (R. 750) and in the colloquy which followed the judge reiterated his understanding of the law and restated what he had intended to convey to the jury.

In instructing the jury on the requirement of proving a likely source, the Court said (R. 743-744):

> "The only direct evidence of source, except for the statement made by Mr. Garrity to the Internal Revenue Agent was that the defendant received a large sum of cash from his father or his father's estate."

He went on to say, (R. 744):

> "Now I want to say just one other thing to you. If you find that the story about sums of money, X dollars, coming, allegedly coming from the estate of his father,—if you find that statement was so, that it was made and that it was false, then I am going to charge you, and this would have reference to only one period after the father had died,—I am going to charge you that the Government is under no obligation to show a likely source if you find there has been a wilful fabrication."

He further stated, (R. 755):

> "Now if you find that the defendant wilfully fabricated through Mr. Garrity an account of the receipt of non-taxable income from the father's estate, and that the defendant (1119) intended to convey to the representatives of the Bureau of Internal Revenue that the re-

ceipt of non-taxable income from that source materially contributed to his increase in net worth during any of the years named in the indictment, you may then infer that the defendant was concealing the receipt of current taxable income."

In instructing the jury on the relevancy of the testimony concerned with alleged acceptance of graft by the respondent prior to 1943, the Court charged, (R. 734):

"Now, I say this advisedly: the source which the Government alleges—and if I am wrong I desire to be corrected—is illegal payments by persons unknown to induce this defendant Massei to perform acts of misfeasance, malfeasance and nonfeasance, to do something that was improper, (1090) that was wrong, and that with particular application to the position which he held, a position of a fiduciary nature, a position of a police officer, a member of the police force of the City of Worcester. There is a presumption, and I am going to instruct you on this, there is a presumption that a police officer does not receive illegal payments. That is a very, very efficacious presumption, and it would apply to other men holding offices of trust and confidence, but if you find that that presumption had been rebutted, and rebutted by the test that I have given you, has been rebutted, for example, by the admissions made by the defendant, so far as the presumption applies to him, then I charge you that you may infer, having in mind his continued position in the police department, you may infer that continued payments of this sort were a likely source of the increases in net worth reflected by the Government's evidence, if you find that they showed it."

He further charged (R. 749):

> "It's the Government's contention that if you believe—if I am incorrect, I want the United States Attorney to correct me—it is the Government's contention that if you believe that these sources of monies came to (1110) him in sums which represented payments in the manner that was testified to by witnesses, having in mind his salary at the time, that a likely source of income he got as a police officer, that that likely source of income continued while he was in the Police Department down to 1950, or whatever time he retired. Isn't that your position?"

On the question of corroboration the judge charged (R. 743):

> "If you believe that admissions were made by the defendant's attorney with authority to make admissions, you must find the admissions were corroborated before you weigh the admissions against the defendant. What is corroboration? Simply this. Some independent evidence which tends to strengthen the admissions, something which tends to bear them out, something which causes your belief in the admissions to become stronger."

CONCLUSION OF THE TRIAL

The respondent moved for acquittal (R. 779) on each indictment at the close of the Government's case (R. 607), at which time the Court declined to rule on the motion, and renewed the motion at the close of all the evidence (R. 679). A hearing was held on the motion (R. 679-700) and it was denied (R. 700). The respondent filed requests for instruc-

tions (R. 3, 779-786). After the charge the respondent entered numerous objections (R. 745-756), which were overruled.

The jury retired and returned with a verdict of guilty on each count (R. 757-758). The respondent was sentenced to two years' imprisonment and a fine of $5,000.00 (R. 4).

Summary of Argument

This is a net worth case, and to sustain its burden the Government must prove the following:

1. Attempt to evade;
2. Attempt was willful;
3. Additional tax owing;
4. Establish a starting point with reasonable certainty;
5. Introduce evidence of a likely source to account for the increases in net worth.

This case resolves itself into the question of whether the Government satisfied its burden of proving the essential element of a likely source.

The Government in its brief argues that it satisfied its burden of proof in this particular by three lines of proof:

1. Evidence of an increase in net worth plus negation of sources of nontaxable receipts.

This line of proof respondent submits is clearly not sufficient under the decision of *Holland* v. *U. S.*, 348 U.S. 121. Indeed, from reading the Government brief it seems clear that the Government itself believes that this evidence is only sufficient when coupled with other evidence.

2. Evidence of a calculated fabrication so as to bring it within the decision of *U. S.* v. *Adonis*, 221 F.2d 717.

Respondent submits that the Adonis decision is not good law, but even if this Court should decide that a "calculated fabrication" can be a substitute for the affirmative proof of a likely source, there is no evidence in this case of such a "calculated fabrication".

3. Alleged admissions by respondent and respondent's counsel of accepting graft in pre-indictment years from which the Government asks that an inference be drawn that graft was received in the indictment years.

This line of proof resolves itself into a question of the admissibility of evidence. The Government asks that admissions of the respondent and his attorney as to graft taking by respondent in pre-indictment years be admitted to prove that respondent took graft in the years under indictment. Indeed there was not one iota of evidence introduced as to any graft taking in the indictment years or even opportunity for taking graft other than the fact that the respondent remained in the police department. Respondent objected to the admissibility of these alleged admissions on the following grounds:

(1) Irrelevancy and immateriality;
(2) Lack of corroboration;
(3) Incompetency as being in violation of the attorney-client privilege and as being beyond the scope of the attorney's authority.

The Court below in its opinion held that the alleged admissions should have been excluded as being irrelevant and also as being uncorroborated. As a result, the Court below never reached the question as to whether this evidence could be a substitute for the "likely source" as demanded by the *Holland* case. As the Court below said at page 905:

"While we have mentioned the *Adonis* case, above, and the Second Circuit *Ford* case, earlier in this opinion, we do not mean to infer that we either approve or disapprove of the exceptions to the necessity of proving likely source that these holdings seem to have established."

In short, without the evidence of the alleged admissions in the case, the Government has completely failed in its burden of proof. Even if this evidence were admitted, respondent submits that the Government has failed to satisfy its burden of proof under the doctrine of the *Holland* case and its Bill of Particulars wherein the Government indicated it was going to introduce affirmative evidence of graft taking in the indictment years.

Argument

I. Evidence Proving No Nontaxable Receipts Does Not Support the Inference that the Increases in Net Worth Must Be Attributable to Unreported Taxable Income.

The Government investigation showed the respondent received no nontaxable receipts. From this proof of a negative character the Government argues that the 'bulge' must be taxable income. In *Holland* v. *U. S.*, 348 U.S. 121, the Government was required to reasonably negate other nontaxable sources of income in addition to showing a likely source to account for the increases in net worth. L. Hand, J. in *U. S.* v. *Costello*, 221 F.2d 668, 670, 671 discusses the *Holland* case and the burden on the Government as follows:

"However, this is not enough, for it does not follow that all that the taxpayer expended was necessarily

> taxable income, or indeed income of any kind. Conceding something for the difficulty of establishing by impregnable proof how much was income, the Court is satisfied with 'proof of a likely source, from which the jury could reasonably find that the net worth increases sprang'. True, a 'likely source' may not be the true source, so that it is necessary in addition to exclude the possibility that what he received did not come from gifts, inheritances or loans. Here too the Court does not exact precision, for, 'where relevant leads are not forthcoming, the Government is not required to negate every possible source of nontaxable income, a matter peculiarly within the knowledge of the defendant.' "

Hence, it was error for the trial court to charge the jury that an increase in net worth plus negation of sources of nontaxable income is sufficient basis for the jury to find that increase alleged is income (R. 738; Respondent's objection, R. 750). (The trial court's thinking in the matter is clearly set out in the colloquy in R. 692-694.)

It is interesting to note that the Government investigation in no way negated the possession of cash by the respondent at the beginning of the period. Indeed, the Government tries to prove source through the alleged admissions of respondent's counsel. These admissions if anything prove substantial cash in the respondent's possession prior to the period. This proof of a negative character actually goes to destroy the certainty of the fixed starting point. If these admissions prove anything, they prove cash in the possession of the respondent while on the vice squad. Yet the Government allows him no cash at the start of the period.

II. There Was No Evidence of a Deliberate Fabrication Indicating a Consciousness of Guilt.

The Court also charged that there was evidence of deliberate fabrication by respondent. The Court stated that there was an alleged admission that respondent "received a large sum of cash from his father or his father's estate . . . but if the jury did not believe this assertion it could infer as to the years 1948 and 1949 that the monies reflected by the net worth evidence came from a taxable source". (R. 74[illegible] Respondent's objection, R. 749, 754 and 755)

It should first be noted that the Court was incorrect as to the evidence on this point. First, the evidence applies only to the year 1949, whereas the Court charged that the jury could infer source from this evidence for both the years 1948 and 1949. Secondly, there was never any evidence in the record as to the amount allegedly received by the appellant. One Government witness testified (R. 581) that the phrase "X dollars" was used. Another Government witness stated that no figure was mentioned (R. 491). Clearly, on this state of the evidence, even if the *Adonis* theory applied, the alleged fabrication was immaterial.

The Court was obviously charging the jury as to how to find source on the theory of *Adonis* v. *United States*, 221 F.2d 717. The facts in that case are clearly distinguishable. Adonis had been indicted for tax evasion for the year 1948. The Government proceeded on the net worth theory. In 1951, Adonis testified in a judicial proceeding in Holland and was questioned as to the increase in his net worth in the year 1948. In this judicial proceeding, Adonis offered five different sources which together made up the total increase in net worth. At the tax evasion trial, the Government offered in evidence Adonis' testimony in the Holland judicial proceeding and then proceeded to prove

that his explanations as to source were fabrications. The Court of Appeals ruled that this calculated fabrication was sufficient evidence from which the jury could infer that the source of his increase in net worth was taxable income.

Respondent respectfully submits that a casual statement of respondent's counsel, if admissible at all, certainly did not constitute a "calculated fabrication" such as was made in the *Adonis* case. As the Court below said in its opinion at page 905, "Since we do not believe this was a 'calculated misrepresentation' within the meaning of the *Adonis* case, we believe that case is inapplicable".

III. The Court Below Was Correct in Holding that the Trial Judge Should Have Excluded Extra-Judicial Admissions by Respondent that He Took Graft In Pre-Indictment Years as Irrelevant and Immaterial.

The Court below correctly held that the testimony as to respondent's activities from 1923 to 1943 should have been excluded as irrelevant and immaterial. The respondent himself allegedly admitted grafting on the occasion of his opening a safe deposit box in the Westerly, Rhode Island bank. According to Agent Calatrello, whose version of the episode was more complete than Hurst's, the special agent asked the respondent the source of the funds that were used to acquire the various assets; the respondent replied that the funds came from many different people; respondent's attorney interrupted, saying the respondent got them during prohibition days when he let liquor trucks roll through Worcester; the respondent added that the payments were gifts which he believed were not taxable (R. 600). On three other occasions respondent's attorney allegedly made similar statements and added that the

respondent received graft while on the vice squad between 1933 and 1943.

This was the sole evidence supporting the particulars filed by the Government that "the likely source of unreported income of the defendant is moneys received by the defendant from many persons engaged in various illegal activities for * * * services rendered to such persons in connection with such illegal activities." In other words, the prosecution asked the Court and jury to infer that the respondent accepted in 1946, for example (Exhibit 44, R. 775), bribes amounting to $26,426.11 on the basis of his having claimed that this money represented graft taken in prohibition days and before 1943, when he was transferred from the vice squad. The prosecution sought to prove that the respondent took bribes at the rate of $500 per week during 1946 by evidence that "during the prohibition years" he received unspecified illegal payments from "every truck loaded with liquor that passed through the main street of Worcester" (R. 486). It is noted here that, unlike the usual net worth tax evasion defendant, the respondent was a salaried employee and had no income-producing business.

In *Railton* v. *United States*, 127 F.2d 691, the respondent was a city official and was convicted of conspiracy to steal Government property. The chief prosecution witness, who had been indicted as a co-conspirator, was permitted to testify that on several instances previous to the crime involved in the trial, he and the respondent had stolen property belonging to the city. The Court of Appeals reversed the conviction, stating at p. 693:

> "* * * It is logical to conclude, and very apt to be concluded, that because a man was dishonest once he will steal again. It is certainly 'more probable' that a crooked official did steal than if he were an upright

> one. Yet our law forbids these very premises. It cannot be shown that the accused has committed other similar crimes to show that it is probable he committed the one charged. * * * *

In the case at bar the only basis for the admission of evidence as to the respondent's conduct in prohibition days was to show that he was disposed to be dishonest. The words of Judge Parker in *Lovely* v. *United States*, 169 F.2d 386, seem precisely in point:

> "The rule which thus forbids the introduction of evidence of other offenses having no reasonable tendency to prove the crime charged, except in so far as they may establish a criminal tendency on the part of the accused, is not a mere technical rule of law. It arises out of the fundamental demand for justice and fairness which lies at the basis of our jurisprudence. If such evidence were allowed, not only would the time of courts be wasted in the trial of collateral issues, but persons accused of crime would be greatly prejudiced before juries and would be otherwise embarrassed in presenting their defenses on the issues really on trial."

The respondent was charged with tax evasion for 1942 and 1943 in *Sang Soon Sur* v. *United States*, 167 F.2d 431. It does not appear in the opinion whether or not the prosecution used the net worth method. In making a statement to an investigating agent of the Treasury, the respondent admitted that he had been charged with possessing opium in 1936 and was convicted of having some opium in 1934. The trial judge denied the respondent's motion to strike those admissions from the agent's testimony. The Court of Appeals reversed the convicting, stating at p. 432, "We fail to perceive any relevancy between an evasion of the

payment of income taxes and a conviction for the possession of opium."

In *United States* v. *Adonis*, 221 F. 2d 717, the respondent was charged with tax evasion for 1948. The Government offered testimony that the respondent had admitted that in 1950 he was a "go-between for the pinball operators and the government." The Court of Appeals stated at pp. 720-721:

> "* * * If this evidence had been connected with the year 1948 it would have supplied a significant indication of a likely source of unreported 1948 income. But we think that this unamplified statement of what the appellant was doing in 1950 is too far removed in time from the taxable year to provide any substantial support for an inference that he received income from that source in 1948. * * *"

It is submitted that as to proof of a likely source of allegedly unreported income, there is no logical distinction between an inference based on conduct two years after the year for which the defendant was indicted and conduct two years before.

The law does not permit any inference that because a man has sinned once he will sin again. *Railton* v. *United States*, 127 F.2d 691, 693 (C.C.A. 5). During the indictment years the respondent's duties with the Worcester Police Department were entirely different from his duties during the prohibition era when, it is alleged, he admittedly took bribes from bootleggers. From 1943 to 1947, and again from 1949 to 1951, he was personnel officer with the duty of inspecting the physical plant and personnel and seeing that patrolmen carried out their assignments. From 1947 to 1949 he was License Board investigator, charged with investigating license applications for taxicabs, gas stations and parking lots. There was no

evidence of what opportunities he had to receive graft during this period. Unless we adopt the reasoning of the dissenting opinion in the Court of Appeals and take judicial notice that a police officer in any assignment has an opportunity to receive graft, there is no showing that the respondent's duties and responsibilities during the indictment years were such that it would be worth anyone's while to bribe him. The Government's position on this evidence, in other words, is that the fact that a police officer received bribes at one stage of his career proves that he took bribes during his entire time on the Police Department no matter what his rank, his assignment or whom he was dealing with. No conviction in a criminal case should be allowed to rest on such evidence.

IV. The Court Below Was Correct in Holding That the Alleged Admissions of Respondent and His Attorney Were Uncorroborated.

The alleged admissions of the respondent and his attorney were the only evidence offered by the prosecution as to the likely source of the respondent's alleged unreported income, which source the prosecution contended was services rendered to persons engaged in illegal activities. Unless those admissions were corroborated, they should have been stricken from evidence and withdrawn from consideration by the jury. *Smith* v. *U. S.*, 348 U.S. 147; *U. S.* v. *Calderon*, 348 U.S. 160; *Opper* v. *U. S.*, 348 U.S. 84. In the *Smith* case, Mr. Justice Clark stated:

> "An admission which assumes this importance in the presentation of the prosecution's case should not go uncorroborated, and this is true whether we consider the statement an admission of one of the formal 'elements' of the crime or of a fact subsidiary to the

> proof of these 'elements.' It is the practical relation of the statement to the Government's case which is crucial, not its theoretical relation to the definition of the offense."

There was not an iota of corroboration in the evidence of the respondent's having taken bribes during prohibition days or while on the vice squad. Nor was there any corroboration of the respondent's alleged implied admission that he took bribes during the prosecution period from 1946 to 1950. Nevertheless, the prosecuting attorney, in argument to the Court, referred to the respondent as "a defendant with 25 years of experience in taking graft" (R. 362)!

The character or intent of the respondent were not put in issue by the evidence of whether the respondent took bribes. The only issue was the *fact* of whether he took them or not. The question of relevancy and corroboration become closely connected in this respect.

> "When the very doing of the act charged is still to be proved, *one* of the evidential facts receivable is the person's Design or Plan to do it (ante Sec. 102). This in time may be evidenced by conduct of sundry sorts (ante Sec. 234) as well as by direct assertions of the design (post Sec. 1725). But where the conduct offered consists merely in the doing of other similar acts, it is obvious that something more is required than mere similarity, which suffices for evidencing intent (ante Sec. 302)." (Emphasis added) Wigmore on Evidence, 3rd Ed. 1940, Sec. 304.

It is submitted that the "something more" spoken of by Wigmore is independent corroborative evidence. The

similar act is only one of the evidential facts receivable; it must be supported by the offer of others. None were offered because none existed.

V. The Trial Court Erred in Failing to Exclude the Alleged Admissions By Respondent's Counsel That Respondent Had Taken Graft in the Pre-Indictment Years On the Grounds That it Violated the Attorney-Client Privilege and That Counsel Was Not Authorized to Make Extra-Judicial Admissions in Aid of A Criminal Prosecution of His Client.

These reasons for the exclusion of the alleged admissions by respondent's counsel were properly argued both at the trial and in the Court of Appeals. The Court below, however, did not touch on these questions in its opinion. Nonetheless, respondent respectfully urges that these additional reasons for exclusion should be considered at this time. Respondent submits that with the alleged admissions excluded, the Government has no case. Respondent feels that the reasons for exclusion discussed in this section of the brief are just as valid as the reasons of relevance and lack of corroboration as adopted by the Court below. If this Court finds any one of these three reasons valid, there will be no need to go farther. Hence, respondent feels that these additional reasons for exclusion should be considered by this Court at this time.

There is a two-fold question involved here. One concerns the violation of an attorney-client privilege in the disclosure to Treasury agents of facts revealed to an attorney. (There can be no doubt that any information respondent's counsel had of Massei's activities was acquired from Massei and not of his own knowledge). The second question involves the authority of an attorney to make extra-judicial admissions in aid of a criminal prosecution of his client.

Does the engagement by a taxpayer of an attorney to represent him in a criminal proceeding or to prevent a criminal prosecution authorize the attorney to supply the necessary evidence required to complete the government's case in the form of admissions of certain conduct on the part of his client?

Stated in this manner the answer seems obvious. No man facing a criminal action hires an attorney to invest him with authority to supply the missing pieces of the government's case. Should the District Court judge's ruling in the instant case be upheld, no attorney would ever dare to confer with Internal Revenue Agents concerning his client's civil liability or criminal liability. Extended further, attorneys would hesitate to offer a plea of guilty to a lesser crime or a compromise of a civil suit. Such would go against a policy of the law which favors the settlement of controversies without litigation. See 4 Wigmore on Evidence s. 1061. An attorney is not a person whose admissions may be used against the party client, except so far as they concern the management of the litigation. 4 Wigmore on Evidence s. 1063. Lord Mansfield stated the proposition as follows: "I am not aware that any conversation of an attorney, not spoken upon oath, nor proved to be authorized by his client, can bind the client." *Wilson* v. *Turner*, (1808) 1 Taunt. 398, 127 Eng. Repr. 888. The admissions in the case at bar, made during an attempt by the attorney to prevent a trial, obviously were not made by him for dispensing with proof of these facts at the trial. "It was a conversation relating to a fact in controversy, but not an agreement relating to the management and trial of a suit, or an admission intended to influence the procedure in the pending action, or in any other . . . ." *Pickert* v. *Hair*, 146 Mass. 1, 5. *Saunders* v. *McCarthy*, 8 Allen 42, 45. *Procter* v. *Old Colony Railroad* 154 Mass. 251. *Hicks* v. *Naomi Falls Mfg. Co.*, 138 N. C.

319, 50 S.E. 703. *Horseshoe Mining Co.* v. *Miners' Ore Sampling Co.*, 147 Fed. 517 (C.C.A. 8). *Humble Oil & Refining Co.* v. *Sun Oil Co.*, 191 F. (2d) 705 (C.A. 5)

Of course, there are exceptions to the rule making privileged a communication by the client to the attorney. One of these is the situation where the client has obviously communicated information to the attorney with intent that he communicate it to other persons. *Loomis* v. *New York, New Haven & Hartford Railroad*, 159 Mass. 39, 44. *United States* v. *Shibby*, 112 F. Supp. 734 (D.C., S.D., Calif.) Once the client discloses the privileged matter (or his version of it) he waives the privilege. *Stein* v. *First National Bank of Sarcoxie, Mo.*, 298 Fed. 36 (C.C.A. 8). *Hunt* v. *Blackburn*, 128 U.S. 464. A statement made by a client to an attorney in an attempt to get help in the commission of a crime is not privileged. *Standard Fire Insurance Co.* v. *Smithhart*, 183 Ky. 679. The privilege, of course, has no application where the parties involved in the communication do not stand in the relationship of attorney and client. *Steiner* v. *United States*, 134 F. (2d) 931 (C.C.A. 5), (attorney spoke to another attorney in the latter's capacity of member of the Board of Governors of state bar association). *Himmelfarb* v. *United States*, 175 F. (2d) 924 (C.A. 9) (statements made to an accountant hired by the defendant's attorney were not privileged and admissible through the accountant). *Wild* v. *Paysen*, 7 F.R.D. 495 (D.C., S.D., N.Y.)

Where an attorney attempting to negotiate with the Treasury on behalf of his client, submitted his client's answers to questions asked by the Treasury, there was no violation of the privilege in calling him to the stand at the client's trial to identify the papers containing the questions asked by the Treasury and the answers given by his client. *Banks* v. *United States*, 204 F. (2d) 666 (C.A. 8).

The government's position here is that the attorney was

the defendant's agent and thus authorized to make admissions on his behalf. Of course, if the attorney was in fact Massei's agent, any statement made by him within the scope of his agency was a statement made by Massei. *Dastagir* v. *Dastagir*, 241 P. (2d) 656. *American Fur Co.* v. *United States*, 2 Pet. 358, 364. The government, having claimed the existence of an agency had the burden of proving it. *Beard* v. *United States*, 59 F. (2d) 940 (C.C.A. 8). "Since the burden is primarily upon the party asserting the existence of the agency to not only prove its existence, but also the nature and scope of the agent's authority * * * * * it is necessary to an assumption of authority to commit a particular act that such act be first shown to be within the general class of acts which constitute the agent's duties." *Gosney* v. *Metropolitan Life Insurance Co.*, 114 F. (2d) 649 (C.C.A. 8). Such authority cannot be proved by the hearsay statements of the agent himself. *Brownell* v. *Tide Water Associated Oil Co.*, 121 F. (2d) 239, (C.C.A. 1). There is nowhere in this record any evidence of the contents of the power of attorney filed in this case (if in fact one was filed). There is nothing, in other words, to show that the position of the attorney was anything but that of attorney. There is no showing that the defendant authorized revelation of any information he gave his attorney, and where a person, as a client or prospective client, consults a member of the bar in his capacity as such, the communications in confidence of matters which are or which the client reasonably supposed to be necessary to the proper conduct of legal business, not unlawful, is privileged at the option of the client. *United States* v. *United Shoe Machinery Corp.*, 89 F. Supp. 357 (D.C., Mass.). If any evidence was obtained as the result of the violation of the attorney-client privilege, it was obtained illegally and hence was not admissible. *Weeks* v. *United States*, 232 U. S. 383. *Gould* v. *United States*, 255 U. S. 298.

Inasmuch as there was no evidence of the extent of Garrity's authority as an agent, and, since no authority to make admissions binding on his client may be assumed from his position as an attorney, it was error to allow this evidence to go to the jury.

VI. The Court Below Was Correct in Holding that Proof of a Likely Source of Unreported Income Is an Indispensable Element of a Net Worth Case.

A. The Decision of the Court Below Does Not Conflict with the *Adonis* Case or *U. S.* v. *Ford*, 237 F.2d 57.

It is respondent's position that this Court, as was the case with the Court below, will never reach the question of source since the only evidence offered by the Government as to source was inadmissible. The holding of the Court below that proof of a likely source of unreported income is "an indispensable element" of a net worth prosecution was unnecessary to the decision. It is the Government's position that there must be evidence to support the inference that the net worth increases are attributable to currently taxable income rather than to nontaxable receipts. But, striking out the alleged admissions by respondent and respondent's counsel, there is no evidence at all in the case to support the desired inference.

B. The Respondent Respectfully Submits That the Following Is a Correct Statement of the Law Applicable to This Case.

In a 26 USC 145(b) prosecution, the Government must prove the existence of three elements: (1) an attempt to evade and defeat; (2) willfulness; (3) an additional tax

owing. This case is a net worth case. Attention is focused on the differences between the taxpayer's assets and liabilities as of the beginning and as of the end of a given prosecution year. The increase in net worth is presumed to be net income if the Government satisfies two additional conditions:

(1) That there is evidence of a likely source to account for the increases in net worth;

(2) That the Government has established with reasonable certainty a fixed starting point.

Source may be proved in one of two ways:

(a) By showing that the taxpayer is in an income-producing business from which the income could have been derived. *Holland* v. *U. S.*, 348 U.S. 121 (hotel business proved to be capable of producing much more income than was reported); *U. S.* v. *Johnson*, 319 U.S. 503 (concealed ownership by taxpayer of gambling houses).

(b) By evidence of specific items of unreported income. In *U. S.* v. *Chapman*, 168 F.2d 997, the Government showed a possible source of income by testimony that during the prosecution period seven meat pedlers paid overceiling prices for purchases from the defendant's company, paying the excess in currency either to Chapman direct or to his salesmen. In *U. S.* v. *Skidmore*, 123 F.2d 604, there was evidence that bookmakers paid monthly sums to the defendant in currency for "protection".

As to this proof of source, there must be some independent showing that the source alleged might be the

source of the unreported income. *Holland* v. *U. S.*, 348 U.S. 121; *Thomas* v. *Commissioner*, 232 F.2d 520.

In addition to this independent showing of likely source, the Government must reasonably negate other nontaxable sources of income.

All of the above propositions were called to the attention of the Court in requests for instructions duly filed by the appellant (R. 779-786).

It should be noted that the appellant's motion for a bill of particulars asked that the Government specify the source of his alleged income for each of the years in question (R. 12). The Government in its answer specified that the source was illegal payments to appellant as a police officer by many persons engaged in various illegal activities (R. 13). It is clear on this answer that the Government must make an independent showing of such illegal payments to appellant during the indictment years.

C. The *Adonis* Decision and the *Ford* Decision Are In Conflict with the *Holland* Case and Basic Constitutional Law.

The *Adonis* case and the *Ford* case are exceptions carved out of the *Holland* rule requiring the Government to prove a likely source in a net worth case. As stated by Frank, J. in his dissenting opinion in the *Ford* case at page 72:

> ". . . I question whether *Holland* v. *U. S.*, 348 U.S. 121, 75 S.Ct. 127, 99 L.Ed. 150, ever permits a conviction in a net worth case without proof of a 'likely source', which (to quote Judge Hincks) 'the defendant had actually drawn upon.' "

As Judge Frank points out at page 70:

> "*Holland* v. *United States*, 348 U.S. 121, 75 S.Ct. 127, 99 L.Ed. 150, and its companion decisions warn us that the net worth method is a dangerous instrument, to be used with caution, lest it may have the effect of unconstitutionally putting on an accused the burden of proving his innocence."

Shifting the burden of proof is exactly what Woodbury, J. does in his dissenting opinion in the Court below. His dissent stands for the proposition that because a man is a police officer, the Government need only show an increase in net worth plus negation of nontaxable sources. As he says:

> "It seems to me that proof of position on a municipal police force, where everyone knows opportunities for graft exist, is as much proof of a likely source of unreported income as is proof of ownership of a business capable of producing income."

In view of all the cautions and safeguards set out by this Court in the *Holland* decision, respondent respectfully submits that the dissent in the Court below is clearly wrong. Even more basic error, however, is that Judge Woodbury's dissent and to a lesser extent the decisions in the *Ford* and *Adonis* cases put the burden on a defendant to prove his innocence.

Conclusion

Respondent respectfully submits that the judgment below should be affirmed.*

Respectfully submitted,

RICHARD MAGUIRE
Attorney for Respondent

THOMAS J. CARENS
ROBERT J. SHERER,
Of Counsel.

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* The Court below did not pass on several issues raised by the respondent. For the Court's information, these issues are as follows:

1. The Court erred in refusing to allow appellant to be heard and offer evidence in support of his motions to dismiss the indictment because of improper presentation of improper evidence to the grand jury and to inspect the grand jury minutes.
2. The appellant was denied a speedy trial.
3. The Court should have decided the question as to the attorney's authority and erred in submitting it to the jury.
4. The Court erroneously excluded testimony offered by the appellant to prove that his attorney's alleged admissions were rhetorical and not factual.
5. The Court's charge to the jury misstated the law as to the net worth method of proving tax evasion and the admissibility of the attorney's alleged admissions.
6. The Court allowed two blackboards containing the Government computations to go to the jury room without adequate instructions.
7. The Court permitted the Government to introduce evidence beyond the scope of its Bill of Particulars and refused to allow respondent any time to prepare to meet the new theory of the Government's case.